COMMONWEALTH OF MASSACHUSETTS

Appeals Court

HAMPDEN, SS.

No. 2022-P-0322 No. 2022-P-0323

Commonwealth of Massachusetts, *Appellant*,

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JOSEPH B. SULLIVAN &
DERRICK C. GENTRY-MITCHELL,

Defendants-Appellees.

ON INTERLOCUTORY APPEAL FROM JUDGMENTS OF THE HAMPDEN COUNTY SUPERIOR COURT DISMISSING INDICTMENTS

BRIEF FOR THE COMMONWEALTH

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INTRODUCTION

On April 8, 2015, four unarmed, Black men were assaulted and beaten by a group of off-duty Springfield police officers. It took almost four years to bring indictments against the perpetrators, in large part because key witnesses—civilians and police officers—made deliberately false and misleading statements to local, state, and federal law enforcement, and ultimately lied to a grand jury, about what happened that night and who was involved.

Defendants-appellees Joseph Sullivan and Derrick Gentry-Mitchell were each indicted for misleading investigators (among other crimes), on one or more specified dates, in connection with the same continuing investigation into the assault and the cover-up that followed. After two and a half years of litigation—which included denied motions to dismiss and decisions by the trial court that these indictments were amply supported by probable cause—the trial court dismissed each defendant's indictment for misleading, holding that they were defective under Commonwealth v. Barbosa, 421 Mass. 547 (1995), because they each charged multiple criminal acts in a single count. That was reversible error because Barbosa does not apply to indictments, like those at issue here, charging multiple related acts as part of single criminal episode, pattern, scheme, or continuing course of conduct. The trial court also erred and abused its discretion by refusing to amend

the indictments to reflect the evidence and circumstances presented to the grand jury, holding erroneously that dismissal was the only permissible remedy.

To correct these errors, the trial court's rulings should be reversed, and its orders of dismissal vacated. More than seven years after the assault that began this disturbing criminal episode, and three years after defendants were charged, the grand jury's indictments must be respected, and the Commonwealth allowed to bring to trial defendants who obstructed and misled this extended investigation from the very beginning.

STATEMENT OF ISSUES

Each of these two, paired appeals presents the same two, related issues:

Whether the trial court erred in holding that the dismissed indictments were defective under <u>Commonwealth v. Barbosa</u>, 421 Mass. 547 (1995), where the defendants were each charged with one count of misleading investigators, on one or more specified dates, with the same misleading statements, in connection with the same ongoing criminal investigation?

Whether the trial court committed legal error or abused its discretion in concluding that it could not amend the indictments to reflect the evidence and circumstances that were presented to the grand jury—of a single criminal episode and single pattern, scheme, or course of conduct to mislead investigators—and holding instead that dismissal was the only remedy?

STATEMENT OF THE CASE

This is an appeal by the Commonwealth from judgments by the Hampden County Superior Court (Mason, J.) dismissing one indictment against each of the defendants-appellees, Joseph B. Sullivan and Derrick C. Gentry-Mitchell (collectively, "defendants"), in related prosecutions. The trial court granted each defendant's motion to dismiss a single indictment for misleading investigators, G.L. c. 268, § 13B, and the Commonwealth now appeals each order of dismissal pursuant to Mass. R. Crim. P. 15(a)(1). See Record Appendix Vol. I ("RAI")(15-19,28-30,93,96).

Proceedings Below

On March 27, 2019, a statewide grand jury indicted Sullivan for one count of perjury and one count of misleading investigators, and indicted Gentry-Mitchell for one count of perjury, one count of misleading investigators, and one count of making a false police report. RAI(7-9,21-23,38-42,79,89). Each defendant was prosecuted in Hampden County Superior Court.

Defendants each moved to dismiss the indictments for lack of probable cause. In two written decisions, the trial court denied Sullivan's motion on January 16, 2020, and denied Gentry-Mitchell's motion on January 21, 2020, finding probable cause and sufficient evidence to support each indictment. RAI(9-10,23-25,43-64).

Gentry-Mitchell subsequently moved to dismiss the indictments for alleged loss or destruction of exculpatory evidence. The trial court denied that motion in another written decision on March 2, 2020, finding no basis for any allegation of prosecutorial misfeasance. RAI(25-26,65-71).

On August 25, 2021, Sullivan moved to adopt and join in the motion of another co-defendant, James D'Amour, to dismiss the indictments for violation of his right to indictment by grand jury, under Article 12 of the Declaration of Rights of the Massachusetts Constitution. On September 29, 2021, Gentry-Mitchell moved to adopt and join in the same motion. On October 7, 2021, defendants each filed their own motions to dismiss the indictments for violation of their Article 12 rights. On October 8, 2021, the trial court held a virtual non-evidentiary hearing (via Zoom) on both Sullivan's and Gentry Mitchell's motions to dismiss. RAI(14-16,28-29).

In a Memorandum of Decision and Order dated October 12, 2021, the trial court granted Gentry-Mitchell's motion to dismiss the indictment for misleading investigators (but denied his motion to dismiss the indictment for making a false police report). RAI(29,79-88). In a Memorandum of Decision and Order dated

October 15, 2021, the trial court granted Sullivan's motion to dismiss the indictment for misleading investigators.¹ RAI(17,19,89-92).

It is from these two orders of dismissal that the Commonwealth appeals.

STATEMENT OF FACTS²

Initial Criminal Assault

The defendants were indicted together, along with several other codefendants, as part of a single criminal episode and continuing investigation into that episode that spanned several years and involved local, state, and federal law enforcement. The episode began with an incident on April 8, 2015, in which four unarmed, Black male civilians were assaulted and beaten by a group of off-duty police officers outside a bar in Springfield, MA. See generally RAII(11-74).

During the late evening and early morning hours of April 7 to 8, 2015, a group of off-duty police officers gathered to socialize and drink at Nathan Bill's

¹ The allowed motions to dismiss did not challenge defendants' perjury indictments, each of which is pending and now stayed awaiting the resolution of these appeals. RAI(19,29).

² Facts recited in this section are taken both from grand jury materials, <u>see</u> RA Vol. II (Impounded), and from the trial court's public decisions summarizing the grand jury evidence. <u>See</u> RA Vol. I; <u>see also Commonwealth v. Stirlacci</u>, 483 Mass. 775, 780-81 (2020) (appellate court reviews evidence underlying grand jury indictment de novo, without deference to trial court's fact findings, in the light most favorable to the Commonwealth). Wherever possible, this brief cites to public record material, and avoids citing directly to impounded, grand jury material except where necessary to do so.

Bar & Restaurant, a local bar. RAI(53). Sometime after midnight, several of the officers had an argument or verbal altercation with some other bar patrons, a group of three or four Black males, who were subsequently asked to leave the bar. <u>Id.</u>

Shortly after 1 a.m., several Springfield Police Department (SPD) cruisers responded to a report of a disturbance outside of Nathan Bill's. <u>Id.</u> When the cruisers arrived, the Black males were leaving the bar on foot, and several other people—bar staff and patrons, including off-duty officers—were standing outside the bar's front entrance. <u>Id.</u> After a brief interaction, the Black males walked away from Nathan Bill's, the bar staff and patrons went back inside, and the SPD cruisers left the scene. RAI(53-54).

Shortly after 2 a.m., police cruisers and an ambulance responded to a 911 call for a disturbance with a possible injured party outside of a convenience store (Murphy's Pop Shop) down the street from Nathan Bill's. RAI(54). When SPD officers arrived on scene, they saw the same four Black males who had left Nathan Bill's less than an hour earlier. Id. Two of them were lying on the ground, at least one badly injured. RAII(21,57-58,70). One of the victims had been knocked unconscious and suffered a concussion, broken leg, dislocated ankle, torn ligaments, bruised head, split lip, and had four teeth knocked loose. RAII(19-23). The other three suffered various bruises all over their bodies, and one was shocked by some kind of taser or stun gun. RAII(43,57-59,69-71,315). Witnesses later

stated that one of the off-duty officers had brandished a firearm and used a racial slur toward the Black males before attacking them. RAII(54,315,397-98,451).

One of the Black male victims told responding SPD officers that they had just been jumped and assaulted by a large group of white males. RAI54-55). One of the victims stated that "we just got jumped by guys from the bar. They just walked back to the bar." RAI(55). An emergency medical technician who responded to the scene later testified that the Black male victims were "pretty ripped up," and that, while uniformed responding officers were in the immediate vicinity, the victims were very loudly "going on about how they just got into a bar fight and had just gotten beaten up by off-duty officers." <u>Id.</u>

One responding SPD officer (Gentry-Mitchell's partner, Jeremy Rivas) later testified that he had learned at the scene that the victims had been attacked by a group of men from Nathan Bill's whom they had argued with earlier, that off-duty police officers were at the bar, and that the assailants "could have been police officers." RAI(55-56). But on the night in question, none of the seven uniformed SPD officers on scene reported the victims' statements, a description of the assailants, the earlier dispute at Nathan Bill's bar, or anything about the presence and potential involvement of off-duty officers.

The Ensuing Investigations

After the assault, the victims tried unsuccessfully to report the crime to SPD. After repeated efforts, and about one month after the incident, one of the victims filed a citizen's complaint with SPD, alleging that he was jumped and knocked out by off-duty officers at Nathan Bill's, that he was badly injured, and that the responding police officers were not helpful or sympathetic to him. The victims subsequently gave several statements to investigators. RAII(25-27,59-62,71-72).

SPD and Hampden County Investigations. After receiving the citizen's complaint, SPD initiated two parallel investigations in the summer of 2015. The Major Crimes Unit (MCU) was charged with investigating the allegations of a criminal assault and battery with serious injuries. The Internal Investigations Unit (IIU)³ was charged with investigating the possible involvement of and misconduct by SPD officers. See generally RA Vol. II. When MCU completed its investigation, it referred the results to the Hampden County District Attorney's Office, which then conducted its own inquiry, but ultimately declined to bring any criminal charges relating to the events of April 8, 2015.

<u>Federal and Statewide Investigations.</u> When no criminal charges were filed and no further action was taken at the local level, one of the victims reported the

³ At times, the IIU was also referred to as the "Internal Affairs Unit" (IAU). See, e.g., RAI(81,84-85).

incident to the Federal Bureau of Investigation (FBI), alleging that off-duty officers had assaulted him, and that the incident had been covered up by members of SPD. RAI(65-70); RAII(24-25). FBI agents in the Springfield regional field office investigated the matter, interviewed a number of witnesses, and obtained additional evidence. The United States Attorney's Office declined to pursue any federal criminal charges and the FBI referred the matter to the Massachusetts Attorney General's Office (AGO). The FBI and AGO continued a joint investigation and ultimately brought the case before a statewide grand jury, which was convened in Worcester in early 2018. The grand jury was charged with investigating various allegations regarding the April 2015 assault, including that the perpetrators were off-duty SPD officers and that others may have been involved in efforts to conceal the offenses, intimidate witnesses, mislead investigators, or otherwise shield the perpetrators from investigation. RAII(4-9). Over a period of several months in 2018, more than three dozen witnesses including victims of the assault, SPD officers, and other law enforcement and civilian witnesses—testified in the grand jury proceeding.

Indictments

In 2019, the statewide grand jury returned indictments against a total of 16 individuals, 14 of whom were SPD officers.⁴ Seven individuals were charged with crimes relating to the assault and battery of four victims, and nine others (including defendants) were charged with crimes relating to an alleged cover-up of the assaults and their perpetrators' identities. RAI(31,34,36,65).

Among those charged were several of the uniformed, on-duty SPD officers who responded to the disturbances before and after the assault on April 8, 2015, and who then made false and misleading statements about what they saw and heard that night during the ensuing investigations. One of those officers was defendant Gentry-Mitchell.

Also among those charged were two civilians, co-owners and co-managers of Nathan Bill's, who were present on April 7 to 8, 2015, and gave false and misleading statements during the ensuing investigations. One of those civilians was defendant Sullivan.⁵

⁴ Some of those cases were later dismissed, while others proceeded to trial. As of this filing, seven defendants have been tried by jury or by the court, and two of them convicted, while several others are still awaiting trial.

⁵ The first sentence of the trial court's October 15, 2022, Memorandum of Decision and Order contains a typographical error identifying defendant Joseph Sullivan as an SPD officer. RAI(89). In fact, defendant Sullivan is a civilian and not an SPD officer.

Facts Relating to Gentry-Mitchell

Defendant Derrick Gentry-Mitchell, an officer with the SPD, was on patrol with his partner, Jeremy Rivas, on the night of April 7, 2015. RAI(53). Shortly after 1 a.m., the two responded to the disturbance outside Nathan Bill's, where they witnessed several off-duty officers standing near the entrance to the bar and the four Black males leaving on foot. RAI(53-54). Shortly after 2 a.m., they responded to the call for a disturbance or possible man down outside Murphy's Pop Shop. RAI(54).

Officer Rivas testified in the grand jury that he learned outside Murphy's that the victims had been attacked by a group of men from Nathan Bill's whom they had argued with earlier, that off-duty police officers were at the bar, and that the assailants "could have been police officers." RAI(55-56). Officer Rivas further testified that he and Gentry-Mitchell accompanied one of the victims back to the Nathan Bill's parking lot, and that they saw two individuals there who stated they had been involved in a "fight": John Sullivan (another co-owner of the bar but no relation to defendant Joseph Sullivan) and off-duty SPD officer Jose Diaz.

RAI(56). Diaz appeared drunk and had apparently lost his keys, and Rivas and Gentry-Mitchell helped him look for them while walking back toward Murphy's.

Id. Diaz stated that he and "some of the guys" had walked outside of Nathan Bill's and had been involved in a fight, and that he had been "knocked out cold" by one

of the "[B]lack guys." <u>Id.</u> Rivas testified that Gentry-Mitchell was less than ten feet away when Diaz made these statements. <u>Id.</u> Rivas further testified that he later spoke with Gentry-Mitchell about the events of the evening and relayed to Gentry-Mitchell the information he had earlier learned from the victims—that off-duty officers may have been involved in the assault—at some point during their shift. <u>Id.</u>; <u>see generally RAII(195-278)</u>.

Although Gentry-Mitchell did not file a police report that night, he submitted a report to MCU investigators on July 22, 2015, and he also submitted a report to IIU investigators on August 16, 2015. RAI(53,60-62). Gentry-Mitchell later testified before the grand jury on February 22, 2018. RAI(52). On each of these occasions, Gentry-Mitchell stated that on April 7 and 8, 2015, he saw or heard nothing to indicate that off-duty officers might have been involved in the assault and had no reason to believe that they were. RAI(54-56,58-62). On each occasion, Gentry-Mitchell omitted any mention of seeing Diaz after the assault, or of learning any information from Diaz, Rivas, or any other source about the potential involvement of off-duty officers. Id.; see generally RAII(128-193).

On March 27, 2019, the statewide grand jury indicted Gentry-Mitchell on one count of perjury, one count of misleading investigators, and one count of making a false police report. RAI(40-42). The indictment for making a false police report reads:

on or about the 22nd day of July in the year two thousand fifteen at Springfield, in the County of Hampden, or on or about the 16th day of August in the year two thousand fifteen at Springfield, in the County of Hampden aforesaid, [Gentry-Mitchell] did intentionally and knowingly make or cause to be made a false report of a crime to police officers.

RAI(42). The indictment for misleading investigators reads:

on or about the 22nd day of July in the year two thousand fifteen at Springfield, in the County of Hampden, or on or about the 16th day of August in the year two thousand fifteen at Springfield, in the County of Hampden aforesaid, or on or about the 22nd day of February in the year two thousand eighteen at Worcester, in the County of Worcester, [Gentry-Mitchell] did directly or indirectly, willfully mislead a police officer, investigator, or grand juror with the intent to impede, obstruct, delay, harm, punish or otherwise interfere thereby with a criminal proceeding.

RAI(41). In its written memorandum of decision and order of January 21, 2020, the trial court concluded that the grand jury heard sufficient evidence to establish probable case as to each element of the indicted crimes of misleading investigators, making a false police report, and perjury. RAI(57-62). The trial court further observed that Gentry-Mitchell's grand jury testimony was consistent with his police reports, particularly in describing his interaction with the victims after the assault, and in his denials that saw any off-duty officers or heard anything about off-duty officers being present that night. RAI(54-56,58-62).

Facts Relating to Sullivan

Defendant Joseph Sullivan, a part-owner and manager of Nathan Bill's, was working there during the late evening and early morning hours of April 7 to 8, 2015. He intervened in the verbal argument that took place between the victims

and the off-duty officers inside the bar, asked one of the Black males to leave, and spoke with some of the on-duty officers who responded to the bar just after 1 a.m., before the assault took place. RAI(43-44).

Sullivan subsequently made several statements to investigators about the events of that night. On June 19, 2015, he was interviewed by an SPD detective and gave a videorecorded statement as part of the MCU investigation. On February 24, 2017, and then again on May 16, 2017, he was interviewed by FBI agents. On March 15, 2018, he testified before the grand jury. RAI(43-44).

On those four occasions, Sullivan made inconsistent, false, and misleading statements regarding whether: (i) he could identify any patrons who were in the bar that night; (ii) he was aware that a fight took place between two groups of bar patrons; (iii) he knew any of the off-duty police officers who were in the bar that night; (iv) he noticed or was aware that any officers left the bar after the victims had left, and returned a short while later; and (v) he noticed or was aware that his co-owner and co-manager, John Sullivan, left the bar with a group of off-duty officers, after the victims had left, and returned a short while later.⁶ RAI(45).

Also on each of those four occasions, Sullivan stated consistently that he had

⁶ The trial court's January 16, 2020 Memorandum of Decision and Order incorrectly identified John Sullivan as defendant Joseph Sullivan's brother. RAI(43). In fact, John and Joseph Sullivan are not related, but worked together as co-owners and co-managers of Nathan Bill's.

called a taxicab for the victims when they left the bar, and that he saw the taxi arrive and saw the victims get into, and then get out of, the cab (thereby suggesting that they chose to remain at the scene instead of leaving). RAI(44); RAII(283-326). That factual account was belied by video evidence from a security camera outside the bank adjacent to Nathan Bill's, and the testimony of multiple eyewitnesses.⁷ RAI(44,47-51).

On March 27, 2019, the statewide grand jury indicted defendant Sullivan on one count of perjury and one count of misleading investigators. RAI(38-39). The indictment for misleading investigators reads:

on or about the 19th day of June in the year two thousand fifteen at Springfield, in the County of Hampden, or on or about the 24th day of February in the year two thousand seventeen at Springfield, in the County of Hampden aforesaid, or on or about the 16th day of May in the year two thousand seventeen at Springfield, in the County of Hampden aforesaid, or on or about the 15th day of March in the year two thousand eighteen at Worcester, in the County of Worcester, [Sullivan] did directly or indirectly, willfully mislead a police officer, federal agent, investigator, or grand juror with the intent to impede, obstruct, delay, harm, punish or otherwise interfere thereby with a criminal proceeding.

RAI(39). In its written memorandum of decision and order of January 16, 2020, the trial court concluded that the indictment was supported by probable case as to each element of the indicted crimes of perjury and misleading investigators,

⁷ Sullivan's account was belied by witnesses including Curtis Stevenson, the taxicab driver; Anthony DiSantis, an off-duty SPD officer who was at the bar that night; and the victims themselves. RAI(50).

finding specifically that there was "sufficient evidence to warrant the grand jury in believing that Sullivan misled investigators *and* grand jurors." RAI(49) (emphasis added). The trial court further observed that Sullivan provided the same misleading information in his grand jury testimony as he had in his earlier statements to SPD and FBI investigators. RAI(44).

The Trial Court's Decisions Dismissing the Indictments for Misleading Investigators

Before addressing defendants Gentry-Mitchell's and Sullivan's motions to dismiss the relevant indictments, the trial court first addressed a similar motion that had been filed earlier by another co-defendant, James D'Amour. Like Gentry-Mitchell, D'Amour was a uniformed SPD officer who responded to the scene of the assault on April 8, 2015, and later submitted reports to MCU and IIU investigators regarding the events of that night. He too was charged with making a false police report and with misleading investigators, each in a single indictment, each alleging the offense took place on July 22, 2015 *or* August 18, 2015. RAI(72-73).

In a Memorandum of Decision and Order dated September 14, 2021, the trial court denied D'Amour's motion to dismiss the indictments for duplicity under Commonwealth v. Barbosa, which held that an indictment ambiguously charging multiple felony offenses in a single count may create an unacceptable risk of a defendant's being convicted of a crime for which he was not indicted by a grand

jury. 421 Mass. at 554. Although the trial court concluded that the indictments were flawed as written, it allowed the Commonwealth's motion in the alternative to amend each indictment to allege a "single pattern, scheme, or course of conduct." RAI(75-78). Because the trial court concluded that adding that language was only a matter of form, would not prejudice the defendant, and would not materially change the grand jury's work, it amended each indictment—for misleading investigators as well as making a false police report—and denied D'Amour's motion to dismiss. Id.

In a Memorandum of Decision and Order dated October 12, 2021, the trial court addressed defendant Gentry-Mitchell's very similar motion to dismiss for duplicity under <u>Barbosa</u>, and the Commonwealth's motion to amend the indictments. RAI(79-81). Addressing first the indictment for making a false police report, the trial court stated that although the case was "not identical" to <u>Barbosa</u>, "the same underlying question exists with respect to which of the two incidents was the basis for the indictments.... The evidence before the grand jury does not obviously point to only one date as the basis of the indictments." RAI(82-83). To resolve this issue, the trial court took the same approach as it had in D'Amour's case: it denied Gentry-Mitchell's motion to dismiss and allowed the Commonwealth's motion to amend the indictment to allege that he did "thereby engage in a single pattern, scheme, or course of conduct." RAI(83-88).

Again, the trial court concluded that adding that language to the false report indictment was only a matter of form (not substance), would not prejudice the defendant, and would not materially change the grand jury's work. RAI(84-86). Specifically, the court concluded that if Gentry-Mitchell had been tried on the original indictments, "there is no question that the Commonwealth would be barred from prosecuting him again for the same charges if the indictments were amended to describe the two police reports as part of a pattern or course of a single crime." RAI(84). It further observed that:

The grand jury heard testimony establishing that Gentry-Mitchell submitted both reports in conjunction with [SPD's] ongoing investigation. In light of the similarities in Gentry-Mitchell's police reports and in the context of the police investigation herein, the amendment relates to a single criminal episode and is a matter of form.... That the indictments treat the two police reports as a single course of conduct, scheme, or pattern would not materially alter the grand jury's work.

RAI(84-85).

Turning to the indictment for misleading investigators, the trial court perceived, however, a more "problematic" situation. RAI(86). The difference here, the trial court concluded, was that the indictment referred to not only the two dates of defendant Gentry-Mitchell's false police reports, but also the subsequent date of his grand jury testimony approximately two and a half years later. This additional date, and "the existence of two distinct targets of Gentry-Mitchell's alleged misrepresentation – the police on the one hand, and the grand jurors on the

other -- falls squarely within the ruling in <u>Barbosa</u>." <u>Id.</u> The court further concluded that "[t]he misleading indictment stretches impermissibly thin the Commonwealth's motion that I amend the indictment to allege a single pattern, scheme or course of conduct relating to one target, such as law enforcement officials. The only remedy is dismissal." RAI(87).

In a Memorandum of Decision and Order dated October 15, 2021, the trial court addressed defendant Sullivan's motion to dismiss for duplicity under <u>Barbosa</u>, and the Commonwealth's motion to amend the indictment for misleading investigators. RAI(89-90). Applying the same reasoning as it did to Gentry-Mitchell's latest motion to dismiss—indeed, using virtually identical language—the trial court determined that in this case, the "existence of multiple targets of Sullivan's alleged misrepresentation falls squarely within the ruling in <u>Barbosa</u>," and concluded again that the indictment for misleading investigators could not be amended, and "[t]he only remedy is dismissal." RAI(91-92).

SUMMARY OF THE ARGUMENT

The trial court erred in dismissing the indictments for misleading investigators for three distinct, but related reasons.

First, the trial court erroneously concluded that the indictments were defective, and dismissal required, under <u>Barbosa</u>, 421 Mass. at 554. In that case, the SJC held that an indictment ambiguously charging multiple, separate and

distinct crimes in a single count may create an unacceptable risk of a defendant's being convicted of a felony for which he was not indicted by a grand jury. <u>Id.</u> But that holding does not apply to indictments, like defendants', which allege multiple related acts as part of a single, ongoing criminal episode. Pages 28-38, *infra*.

Second, the trial court failed to recognize that the defendants' acts of misleading investigators, as part of a single pattern, scheme, or continuing course of conduct, could be and were properly charged in a single indictment. In doing so, it ignored significant authority permitting and approving of this approach.

Pages 39-47, *infra*.

Third, the trial court erred and abused its discretion in refusing to amend the indictments to reflect the evidence and circumstances that were presented to the grand jury, determining that such amendment was impermissible, and concluding erroneously that the only remedy was dismissal. Pages 47-54, *infra*.

ARGUMENT

The trial court's dismissal of defendants' indictments for misleading investigators—and its conclusion that those indictments "fall[] squarely within the [SJC's] ruling in <u>Barbosa</u>," and could not be amended, such that dismissal was the "only remedy"—constitutes legal error. No such result was required, and other remedies were available consistent with the law. The trial court's dismissal of the indictments—based on an erroneous interpretation of <u>Barbosa</u> and related

Commonwealth v. Ilya I., 470 Mass. 625, 627 (2015). "An appellate court reviews the evidence underlying a grand jury indictment in the light most favorable to the Commonwealth," and does not defer to the trial court's factual findings or legal conclusions. Commonwealth v. Stirlacci, 483 Mass. 775, 780-81 (2020). Viewed in proper context, the trial court's orders dismissing the indictments must be reversed.

I. The Trial Court Erred in Dismissing the Indictments

The trial court's orders of dismissal were reversible error. The defendants were each indicted on one count of misleading investigators, in violation of G.L. c. 268, § 13B. That statute makes it a felony to

willfully, either directly or indirectly . . . mislead . . . another person who is a . . . judge, juror, grand juror, attorney, victim witness advocate, police officer, correction officer, federal agent, investigator, clerk, court officer, court reporter, court interpreter, probation officer or parole officer . . . with the intent to or with reckless disregard for the fact that it may . . . impede, obstruct, delay, prevent or otherwise interfere with: a criminal investigation at any stage, [including] a grand jury proceeding.

G.L. c. 268, § 13B(b). The trial court's decisions and orders of dismissal were flawed and must be reversed because (A) those indictments do *not* "fall[] squarely within the ruling in <u>Barbosa</u>," which is distinguishable in several key respects; (B) the indictments and the evidence and circumstances presented to the grand jury properly established a single pattern, scheme, and ongoing course of criminal

conduct; and (C) the trial court abused its discretion and misconstrued the law in denying the Commonwealth's motions to amend the form of the indictments, and thereby erroneously concluded that "[t]he only remedy is dismissal." RAI(86-87,91-92).

A. The SJC's Ruling in <u>Commonwealth v. Barbosa</u> Does Not Require Dismissal of These Indictments

The trial court erred in concluding that <u>Barbosa</u> required dismissal of these indictments. In doing so, the trial court ignored significant factual and legal distinctions, and failed to properly consider other relevant authority regarding the charging of multiple acts in a single indictment.

The Commonwealth has "wide . . . discretion in deciding whether to bring criminal charges and in deciding what specific charges to bring." <u>Cedeno v.</u>

<u>Commonwealth</u>, 404 Mass. 190, 196-97 (1989). This includes discretion as to the form, nature, and number of indictments. Generally speaking, where the evidence supports it and absent any statutory directive to the contrary, the Commonwealth is free to charge a series of criminal acts by one indictment, or multiple indictments, as long as the defendant's substantial rights are not violated. <u>See, e.g.</u>,

<u>Commonwealth v. Rollins</u>, 470 Mass. 66, 78 (2014); <u>Commonwealth v. Ortiz</u>, 431 Mass. 134, 138-39 (2000); <u>Commonwealth v. Murray</u>, 401 Mass. 771, 774 (1988);

<u>Commonwealth v. England</u>, 350 Mass. 83, 87 (1966); <u>Commonwealth v. Brown</u>, 12

Mass. App. Ct. 988, 988-89, (1981); <u>Commonwealth v. Jenkins</u>, No. BRCR2013–01141, 2014 WL 6646473, at *2 (Mass. Super. Ct. Oct. 10, 2014).

The SJC outlined an exception to this rule in <u>Commonwealth v. Barbosa</u>, 421 Mass. 547 (1995), where it addressed the issue of "duplicity," which is "the charging of several separate offenses in a single count." <u>Id.</u> at 553 n.10. Specifically, the <u>Barbosa</u> court held that where an ambiguous and "duplicitous" indictment created a substantial risk that the defendant was convicted of a felony crime for which he was not indicted by a grand jury, in violation of Article 12 of the Declaration of Rights of the Massachusetts Constitution, the conviction could not stand. <u>Id.</u> at 554.

The situation in Barbosa was unusual and unlike the present cases. In Barbosa, the defendant was indicted on one count of cocaine distribution, with no indication that the charge was intended to include more than one instance of distribution. Id. at 548. The indictment stated simply that the defendant, "on March 16, 1992 . . . did unlawfully, knowingly and intentionally distribute a certain controlled substance, to wit: cocaine." Id. at 548 n.2. However, the grand jury heard evidence of two separate and distinct drug transactions (two street-level sales to different customers), both conducted by the defendant, a short time apart, on the same day. At trial as well, the Commonwealth presented evidence of *both*

of the drug sales, and the defendant was convicted of the single count of cocaine distribution. <u>Id.</u> at 548-49.

The SJC observed that "on its face, the indictment appears to refer to a single act of distributing cocaine on March 16, 1992," although evidence was presented of two separate cocaine sales on that date. <u>Id.</u> at 550-51. Thus, the grand jury may have intended to indict the defendant, and the trial jury may have intended to convict him, on the basis of one act of distribution, or the other, or both. In these circumstances, the SJC perceived "the very real possibility that the defendant was convicted of a crime for which he was not indicted by a grand jury." <u>Id.</u> at 550-51. That substantial risk of a violation of the defendant's Article 12 rights warranted reversal of the conviction for cocaine distribution. <u>Id.</u> at 554.

<u>Barbosa</u>'s holding, however, has limited application, and does not require dismissal in this case, which is materially distinguishable.

1. <u>Barbosa</u> Does Not Apply to Indictments Alleging Multiple Related Acts Constituting a Single Criminal Episode

The SJC explicitly distinguished its holding in <u>Barbosa</u> from situations in which an indictment alleges "alternative means of committing the same crime . . . or a continuing offense occurring at several times and places over a period of time." <u>Barbosa</u>, 421 Mass. at 550-51, 551 n. 6 (citing G.L. c. 277, §§ 31 and 32). For those and other reasons, the SJC has found <u>Barbosa</u> inapplicable, and held charging multiple criminal acts in one indictment permissible, where the specific

acts are part of a single, broader criminal offense. See, e.g., Rollins, 470 Mass. at 78 ("The Commonwealth is free to charge the possession of multiple [child pornography] images under a single count on the theory that any of those images may be sufficient to support the conviction."); Commonwealth v. Smiley, 431 Mass. 477, 479-80 (2000) (single indictment for armed assault in a dwelling was proper and posed no Barbosa issue, even though two separate victims and occupants were assaulted within); id. at 480 ("Although the Commonwealth could have sought separate indictments, it was not required to do so.")

This Court has similarly held that, notwithstanding <u>Barbosa</u>, the Commonwealth may properly charge multiple different acts in the same indictment where the acts are part of a single, ongoing, or "continuing criminal episode." <u>Commonwealth v. Crowder</u>, 49 Mass. App. Ct. 720, 721-22 (2000). Applying that principle, this Court has distinguished and rejected <u>Barbosa</u> challenges to indictments alleging multiple, discrete acts, over a period of time, connected by a single scheme or criminal episode. <u>See id.</u> (four separate acts of forcible penetration properly charged within a single indictment for aggravated rape); <u>Commonwealth v. Straker</u>, 2015 WL 5458049, at *3, 88 Mass. App. Ct. 1105 (Sept. 8, 2015) (Rule 1:28 disposition) (rejecting <u>Barbosa</u> challenge to single indictment containing multiple acts, which "occurred as part of an ongoing criminal episode" over several weeks); <u>Commonwealth v. DeCosta</u>, 2015 WL

1376538, at *2, 87 Mass. App. Ct. 1112 (Mar. 27, 2015) (Rule 1:28 disposition) (similar); Commonwealth v. Quadros, 2012 WL 1172186, at *1, 81 Mass. App. Ct. 1128 (Apr. 10, 2012) (Rule 1:28 disposition) ("The fact that the evidence might have supported more indictments than were returned does not mean that he was exposed, as was the defendant in Barbosa, to conviction for conduct that might not have been the basis for indictment."). As these decisions show, "the Commonwealth [is] not required to file separate indictments for each incident of [criminal conduct] to preserve the defendant's art. 12 rights." Commonwealth v. Ravellette, 2009 WL 1442014, at *3, 74 Mass. App. Ct. 1113 (May 26, 2009) (Rule 1:28 disposition) (citing Crowder, 49 Mass. App. Ct. at 721-22; Gurney, 13 Mass. App. at 399 n. 9). Although these challenges have mostly occurred in the context of rape and sexual assault cases involving multiple related criminal acts supporting a single indicted offense, the principle is more broadly applicable.

The logic of <u>Barbosa</u>, the SJC has since observed, derived from the ambiguity of a single indictment that could have been based on either of two "separate and distinct incidents," in circumstances where "it was impossible to tell which of the two incidents gave rise to the indictment." <u>Campagna v.</u>

<u>Commonwealth</u>, 454 Mass. 1006, 1007-08 (2009). It follows that the <u>Barbosa</u> logic does *not* apply where particular alleged acts or incidents are clearly identified

by the information in the indictments, and "there is no confusion about the conduct underlying the indictments." <u>Id.</u> at 1008 (rejecting <u>Barbosa</u> challenge where underlying criminal conduct was clearly identified and citing earlier case where convictions were affirmed "despite the fact that our view of the defendant's conduct may have differed from the grand jury's"). Neither <u>Barbosa</u> nor Article 12 requires the Commonwealth to specify precisely when and how the grand jury determined that the offense was committed. <u>See id.; Commonwealth v. Clayton</u> (No. 1), 63 Mass. App. Ct. 608, 612-13 (2005) (holding that <u>Barbosa</u> challenge failed "because the offense charged in the indictment and that on which the defendant was tried and convicted were the same").

Thus, as this Court has recognized, the key to understanding the result in <u>Barbosa</u> is that because "no other guidance [was] to be found in the evidence before the grand jury, it was not possible to know which act was the basis of the single indictment or the eventual conviction." <u>Commonwealth v. Spencer</u>, 53 Mass. App. Ct. 45, 50 (2001). By contrast, where the evidence presented to the grand jury, and the information in the indictment itself, clearly establish the basis of the underlying criminal conduct, that evidence and the substance of the indictment may properly guide the court's view. "Article 12 does not require that we ignore objective indicators that identify, not only for this court but for the defendant, the offense which is the subject of the indictment." Id.

2. This Case Is Materially Distinguishable from <u>Barbosa</u>

This case is distinguishable from Barbosa in several meaningful ways. Unlike the indictment in Barbosa, which identified only a single date and offense, the defendants' indictments here each identified multiple dates, each of which could only plausibly refer to one act of misleading. Based on the evidence presented to the grand jury, and as acknowledged by the trial court, the three dates in Gentry-Mitchell's indictment each correspond, respectively, to three clearly identified and well-defined misleading statements: his July 22, 2015 written report to MCU; his August 16, 2015 written report to IIU; and his February 22, 2018 testimony before the grand jury. RAI(41,53,60-62,79-80). Likewise, the four dates in Sullivan's indictment also each correspond, respectively, to four clearly identified and well-defined misleading statements: his June 19, 2015 statement to SPD; his February 24, 2017, and May 16, 2017 statements to the FBI; and his March 15, 2018 testimony before the grand jury. RAI(39,43-44,89-91). The ambiguously worded indictment in Barbosa, which specified a single offense and a single date on which multiple separate offenses took place, was the source of the confusion that prevented the court from determining with any confidence the actual basis for the indictment and conviction. See Spencer, 53 Mass. App. Ct. at 50. By contrast, these indictments are quite clear in the multiple, related acts on which they were based.

Even more importantly, in <u>Barbosa</u>, the two separate and distinct transactions each constituted the same statutory offense of cocaine distribution, but otherwise there was no indication that the crimes were in any way related. <u>See Barbosa</u>, 421 Mass. at 548-51; <u>Campagna</u>, 454 Mass. at 1007-08 (describing the drug deals in <u>Barbosa</u> as "two separate and distinct incidents allegedly occurring on the same day"). Besides the fact that both criminal acts were committed by the same defendant on the same day, they were not alleged to be connected to one another or united by any common scheme, intent, or course of conduct. As far as was alleged, each drug transaction was a standalone crime, entirely independent of the other, and the sale to one customer did not have any natural tendency to influence or affect the sale to the other.

Here, not only was the factual basis for the misleading acts on each specified date clearly presented to the grand jury, but the misleading acts were closely connected and, indeed, interdependent. In the weeks following the April 2015 incident, the defendants each initially made false and misleading statements (Sullivan in a police interview, Gentry-Mitchell in an official report to MCU) to investigators regarding their knowledge of whether SPD officers or others were involved in an assault near Nathan Bill's. RAI(43-45,53-62). In those circumstances, the defendants—one an SPD officer himself, the other a manager and co-owner of Nathan Bill's—would have had a natural motive to protect

themselves, their livelihoods, and their friends and colleagues. That motive remained throughout the investigation. And once each defendant made one early statement misleading investigators regarding the events of April 8, 2015, that necessarily influenced and affected subsequent statements they made regarding the same incident, factual issues, and criminal investigation—whether to SPD, FBI, or AGO investigators; or, indeed, to grand jurors. To some extent, commission of the first misleading act required each defendant to commit to a narrative and repeat the same or similar statements later, lest he expose himself to further suspicion and potential liability. In that sense, just as "[a]n offer to give or accept a bribe, while it is outstanding, has a continuing effect," Commonwealth v. Stasiun, 349 Mass. 38, 45 (1965), so too does a misleading statement to an investigator have a continuing effect, until it is corrected or retracted, while the investigation lasts.

In contrast to <u>Barbosa</u>'s ambiguous indictment that *could* have been based on either of two separate and distinct criminal acts, these defendants' indictments each *explicitly was* based on multiple related (and substantially similar) statements made on clearly specified dates. Although the dates of the misleading statements listed in these indictments were separated by the word "or," that does not mean (and there is no authority to suggest) that the indictments must be dismissed. "The fact that two means of committing the [same] crime were charged disjunctively (i.e., by using 'or') is not fatal." Commonwealth v. Kulikov, 2009 WL 259137, at

*1-2, 73 Mass. App. Ct. 1119 (Feb. 5, 2019) (Rule 1:28 disposition) (citing Commonwealth v. Murphy, 415 Mass. 161, 164 (1993)). To the extent the perceived flaw in each indictment was that its use of the disjunctive "or" charged multiple criminal acts in the alternative, that did not justify (much less require) dismissal. See Commonwealth v. Dingle, 73 Mass. App. Ct. 274, 277-82 (2008) (rejecting Barbosa challenge and defendant's argument that "the indictments impermissibly charge two crimes in the alternative by using the disjunctive 'or' . . . [which] did not give him sufficient notice of the charges against him because the word 'or' was ambiguous"). Such a concern may be addressed by measures short of dismissal, especially where (as here) the misleading statements were so closely connected in substance and context. In Commonwealth v. Jenkins, the trial court addressed a single indictment for perjury charging numerous different false statements made on one date "and/or" a second date of a witness's testimony. No. BRCR2013–01141, 2014 WL 6646473, at *1-2 (Mass. Super. Ct. Oct. 10, 2014). The court denied the defendant's motion to dismiss under Barbosa, largely because the false statements, although multiple and made on alternative dates, all related to the same inquiry into the same incident, specifically "who might be responsible for [the murder victim's] death and/or be accessories after the fact." Id. at *2. In so ruling, the court noted that the defendant would be entitled to a specific unanimity instruction at trial, and observed with respect to the perjury indictment that, "[a]s

long as the separate specifications set out different falsehoods, proof of any of the specifications is sufficient to support a verdict of guilty." <u>Id.</u> (citing <u>Gurney</u>, 13 Mass. App. Ct. at 403, 405 n.13). A similar approach is appropriate here, given that all of the misleading statements at issue relate to the same inquiry into the same factual issues.

Indeed, the different dates and specified instances of the defendants' misleading statements to investigators were not merely connected and interdependent; they consisted of factual statements that were substantially the same and repeated successively throughout the course of the same criminal investigation. RAI(43-45,53-62). The grand jury was presented with evidence of a single criminal episode and a pattern, scheme, and course of conduct to willfully mislead and obstruct an investigation into what really happened on the night of the assault, and who was responsible. Compare Jenkins, WL 6646473, at *2. That pattern and scheme was made up of various components, but all to the same ends, by the same means, and with the same intent. Defendants' statements, although made at different times, were in furtherance of the same object: to give investigators—first the SPD and later the FBI, AGO, and the grand jury—a consistently false and misleading narrative of what happened on April 8, 2015.

B. The Commonwealth Presented the Grand Jury with Evidence of a Single Pattern, Scheme, and Course of Conduct to Mislead Investigators, and Properly Charged that Criminal Conduct in a Single Indictment for Each Defendant

Because the evidence presented to the grand jury established that the defendants' successive statements were part of a single pattern, scheme, and continuing course of criminal conduct to mislead investigators, it was permissible—and certainly not incurable error warranting dismissal—to charge them each in a single indictment.

1. Multiple Acts of Misleading Investigators Can Be Charged as a Single Pattern, Scheme, and Course of Conduct

Where an offense involves multiple components, a series of criminal acts motivated or united by a single, continuing criminal impulse, intent, or scheme may be charged in one indictment or in several. Commonwealth v. Murray, 401 Mass. 771, 772-774 (1988). Thus, "where it appears that successive takings are actuated by a single, continuing criminal impulse or intent or are pursuant to a general larcenous scheme, such successive takings constitute a single larceny, regardless of the extent of time which may have elapsed between each taking." Id. at 773 (emphasis added) (quoting Stasiun, 349 Mass. at 45). In Stasiun, the SJC held that even where the indictment did not technically allege a "continuing offense," repeated false statements to obtain benefits under the same continuing misrepresentation, or repeated solicitations for a bribe regarding the same official

action, would warrant charging the multiple acts together as a single offense united by a single intent or general scheme. Stasiun, 349 Mass. at 44-45 (observing that "[a]n offer to give or accept a bribe, while it is outstanding, has a continuing effect"). See also Commonwealth v. England, 350 Mass. 83, 87 (1966) ("The requisite for the finding of a single crime is the 'singleness' of the defendant's intent," and a single crime may be committed "in successive acts impelled by one intent.").

Similarly, this Court has stated that even where an indictment does not connote a "true continuing offense," as that term of art is used and understood, allegations of a course of criminal conduct over a period of time may yet "signify something else—that is, that the defendant has committed a discrete crime, but with a continuing criminal impulse or intent or in the pursuit of a general scheme." Commonwealth v. Megna, 59 Mass. App. Ct. 511, 514 (2003) (citing Stasiun, 349 Mass. at 47). In Megna, the defendant was charged with larceny and extortion of three different victims, and at least one of the indictments covered a period and course of criminal conduct lasting more than three years. Megna, 59 Mass. App. Ct. at 511-12, n.2. Although there was a variance between the trial evidence and the indictment as to the dates of some key acts of extortion, that variance was neither material nor prejudicial, because the fundamental crime and general scheme of extortion was charged clearly in the indictment, and the dates were not

essential. <u>Id.</u> at 514-15 (citing G.L. c. 277, § 20); <u>see also Commonwealth v.</u>

<u>Campiti</u>, 41 Mass. App. Ct. 43, 50 (1996) ("The time alleged for an offense is ordinarily treated as matter of detail rather than substance . . . with the result that there will be no fatal variance if the Commonwealth has alleged one time for the commission of an offense and proves that it occurred, but at another time.") (citing G.L. c. 277, § 20; <u>Commonwealth v. Benjamin</u>, 358 Mass. 672, 678 (1971)).

The trial court's rulings in this case suggest—contrary to Murray, Stasiun, and Megna—that the Commonwealth's only recourse was to charge each instance of misleading investigators through a different indictment. Of course, the Commonwealth presumably could have included language in the original indictments charging explicitly that the specified acts were part of a single pattern, scheme, or course of conduct to mislead investigators. But if that alone would have saved the indictments from dismissal, then surely an amendment to that effect was permissible and should have been allowed. See Argument Section C, infra. In any event, especially under these circumstances, where the defendants' successive statements were so consistent, connected, and related to the same ongoing criminal episode and investigation into the April 2015 assault, the Commonwealth was not required to charge each instance of misleading in a separate indictment. See Smiley, 431 Mass. at 479-80 ("Although the Commonwealth could have sought separate indictments, it was not required to do so."); Ravellette, 2009 WL 1442014,

at *3 ("[T]he Commonwealth [is] not required to file separate indictments for each incident of [criminal conduct] to preserve the defendant's art. 12 rights.") (citing Crowder, 49 Mass. App. Ct. at 721-22; Gurney, 13 Mass. App. at 399 n. 9).

While "the Commonwealth is generally free to bring indictments in as many counts as it feels appropriate in the circumstances," Gurney, 13 Mass. App. Ct. at 399 n.9, courts sometimes disapprove of the practice of "obtaining multiple, repetitious, and overlapping indictments (or counts in indictments) where fewer indictments or counts not only would suffice, but probably would much more clearly present the charges." Benjamin, 358 Mass. at 677-78 (observing that such indictments "impose an unnecessary burden on courts, juries and parties. They cause unnecessary expense and confusion, and may lead to unduly long trials. We regard the practice as objectionable."). Thus, the Commonwealth may properly exercise its discretion to charge related and continuing criminal acts in a single indictment, particularly where such an exercise of discretion may present the charges more simply, clearly, and fairly to courts, jurors, and defendants. See, e.g., Jenkins, 2014 WL 6646473, at *1-2 (denying Barbosa motion to dismiss single indictment for perjury charging multiple statements on different dates and observing that, "[b]y viewing her testimony to the Grand Jury as a continuing course of perjurious conduct, the Commonwealth has avoided problems with multiplicity and limited Jenkins's criminal exposure").

It does not appear that any Massachusetts decisions have directly addressed whether the crime of misleading investigators, G.L. c. 268, § 13B, may be charged in a single-count indictment alleging multiple acts as part of a single pattern, scheme, or continuing course of criminal conduct. In perjury cases, Massachusetts courts have looked to the federal system for guidance, noting the practice there of charging perjury in a single-count indictment with multiple false statements specified separately within. See Jenkins, 2014 WL 6646473, at *1-2; Gurney, 13 Mass. App. Ct. at 405 n.13. See also United States v. Pagan-Santini, 451 F.3d 258, 266-67 (1st Cir. 2006) (government may properly charge multiple perjuries under a single count, within which "there may be alternative theories, alternative factual scenarios, and alternative lines of evidentiary inference").

Other, comparable federal cases are also instructive, including prosecutions under the federal obstruction of justice statutes, 18 U.S.C. § 1503, et seq., which provide the closest federal analog to the offense charged here, G.L. c. 268, § 13B. See, e.g., United States v. Moyer, 674 F.3d 192, 204-06 (3d Cir. 2012) (rejecting duplicity challenge where indictment "alleged multiple false statements in multiple police reports in a single count," and denying motion to dismiss because evidence established a continuing course of conduct, and indictment could fairly be read to charge a single scheme); United States v. Fernandez, 389 Fed. Appx. 194, 198-99, 2010 WL 2842854, at *3 (3d Cir. 2010) (unpublished) ("The charging of separate

acts in one count is permissible if those acts could be characterized as part of a single continuing scheme."); United States v. Davis, 471 F.3d 783, 790-91 (7th Cir. 2006) (rejecting challenge to single indictment for health care fraud setting forth numerous repeated acts, over several years, through three different schemes, where indictment "fairly interpreted alleges a continuing course of conduct, during a discrete period of time"); United States v. Klat, 156 F.3d 1258, 1266 (D.C. Cir. 1998) (rejecting duplicity challenge to indictment charging numerous acts over a period of six months, because to do otherwise would require the government to file separate indictments for each of numerous actionable statements in the course of a single criminal episode); United States v. Brimberry, 744 F.2d 580, 583 (7th Cir. 1984) (holding three different actions separated by several months were in furtherance of the same criminal object to obstruct justice and therefore constituted a continuing course of conduct); United States v. Berardi, 675 F.2d 894, 898 (7th Cir. 1982) (concluding that an indictment may combine three separate acts into one count of obstructing justice, and while the "line between multiple offenses and multiple means to the commission of a single continuing offense is often a difficult one to draw," it sufficed that "the indictment, fairly interpreted, charges Berardi with a continuing course of conduct, during a discrete period of time" to obstruct justice with facts that support such a theory).

These principles suggest that, in this case, the Commonwealth's use of a single indictment for misleading investigators to charge multiple misleading statements over a discrete period of time was permissible, because those statements were in furtherance of the same single pattern, scheme, and continuing course of criminal conduct.

2. The Indictments Fairly Alleged a Single Pattern, Scheme, and Course of Conduct to Mislead Investigators

Although the indictments did not explicitly allege a single criminal episode, pattern, scheme, or continuing course of conduct to mislead investigators, that was the thrust of the evidence and circumstances presented to the grand jury.

Moreover, that was the effect of including each different date and instance of criminal misleading in each indictment—three in the case of Gentry-Mitchell, four in the case of Sullivan.

The evidence and circumstances presented to the grand jury established clearly—and the trial court acknowledged—that defendant Gentry-Mitchell's three misleading statements (to MCU, IIU, and the grand jury) contained the same factual substance, same misrepresentations, and same intent, in furtherance of the same object to mislead the investigation into what happened on April 8, 2015, and specifically whether off-duty SPD officers were involved in the assault that night. RAI(53-62,84-85). Likewise, Sullivan's four misleading statements (to SPD, FBI twice, and the grand jury) contained the same factual substance, same

misrepresentations, and same intent, in furtherance of the same object to mislead the investigation into what happened on April 8, 2015, specifically with the fabricated account that the victims had waved off a ride home (the taxicab) and chosen to stay near Nathan Bill's. RAI(43-45).

As explained above, defendants' successive, substantially similar acts of misleading were closely connected and, indeed, interdependent. Each misleading statement materially influenced and affected the other, as each successive statement would naturally tend to reflect on (confirming or calling into question) the previous statement, and also frame the next one. This was true regardless of whether the misleading statements were made to SPD, FBI, AGO, or to grand jurors. The specific agency or official body being misled was not essential, especially in the information-sharing context of a multi-agency investigation. The essential fact was that each statement was made to a person or persons vested with law-enforcement authority to investigate what happened on April 8, 2015, and specifically whether off-duty SPD officers were involved in the victims' assault on that date. The evidence and circumstances presented to the grand jury showed that those statements were each made with the same intent and object to mislead those investigators by giving them materially false and misleading information regarding essential facts and circumstances of what happened on the night of the assault. RAI(43-45,53-62,84-85). This was sufficient to establish that the crimes charged,

and dates cited in the indictments, were part of a single criminal episode and a pattern, scheme, and continuing course of conduct to willfully mislead and obstruct the ongoing investigation into the assault that took place on April 8, 2015. <u>Id.</u>

C. The Trial Court Erred in Refusing to Amend the Indictments

To the extent the nature of the misleading crimes charged—repeated, consistent, connected, and interdependent statements made with the same factual substance, same intent, in furtherance of the same object to impede the same investigation—was not apparent or fairly inferable from the face of the original indictments, the Commonwealth sought to amend their form to properly reflect the allegation of a single pattern, scheme, or continuing course of conduct to mislead investigators. The trial court's denial of the Commonwealth's motion to amend the indictments was reversible error. The trial court abused its discretion in refusing the proposed amendment without any clear, legitimate reason supported by authority. The trial court also committed legal error in holding incorrectly that it could not allow the proposed amendment and concluding that the only permissible remedy was dismissal. "[I]t is a classic abuse of discretion for a [trial] court to decline to exercise the discretion that it legally possesses because it mistakenly believes that it lacks that discretion as a matter of law." United States v. Concepcion, 991 F.3d 279, 292 (1st Cir. 2021) (Barron, J., dissenting), rev'd, ____ S. Ct. , 2022 WL 2295029 (U.S. Jun. 27, 2022).

The trial court could have amended the indictments, under Mass. R. Crim. P. 4(d), provided any amendment met the requirements that it was (1) a matter of form and not a matter of substance; (2) not prejudicial; and (3) not a material change in the work of the grand jury, or otherwise violative of Article 12.

Commonwealth v. Knight, 437 Mass. 487, 491-92 (2002) (citing Barbosa, 421 Mass. at 549). Amendments are matters of form if they are not essential to the elements of the crime charged, and the time or place of offense is ordinarily treated as a detail of form, not substance. Knight, 437 Mass. at 491. "One test for determining whether an amendment is a matter of form or one of substance is whether a conviction on the original indictment would bar the subsequent prosecution of the defendant based on the amended indictment." Id. at 492-93.

Although the trial court allowed the motion to amend the form of Gentry-Mitchell's false report indictment—and co-defendant D'Amour's false report and misleading indictments—to allege "a single pattern, scheme, or course of conduct," it refused to do so for the indictments alleging more than two acts of misleading investigators. Its reasoning seemed to be that later misleading statements to investigating authorities other than SPD—in Gentry-Mitchell's case, the grand jury; in Sullivan's case, both the FBI and the grand jury—could not be considered part of the same criminal episode, pattern, scheme, or course of conduct. That reasoning is belied by the facts of this case as found by the trial court itself.

The trial court explicitly found that Gentry-Mitchell's two false police reports (like D'Amour's)—because they were so similar, in the context of the same ongoing investigation—"formed part of a single criminal episode," such that amending the indictment to "treat the two police reports as a single course of conduct, scheme, or pattern would not materially alter the grand jury's work." RAI(84-85). It further found that "[i]f Gentry-Mitchell had been tried for the charges based on the original indictments, there is no question that the Commonwealth would be barred from prosecuting him again for the same charges if the indictments were amended to describe the two police reports as part of a pattern or course of a single crime." RAI(84). Yet those conclusions are just as true when Gentry-Mitchell's statements to the grand jury are considered in addition to his police reports. The same criminal investigation that began with SPD continued with the FBI and AGO carrying the same allegations to a grand jury for the first time, and the investigation did not conclude until the grand jury returned indictments. And the same is true with respect to Sullivan, who gave critical misleading statements to the FBI (just as he had to SPD) before the case was even brought before a grand jury.

The trial court's statement that each defendant's potential "conviction on the [misleading] indictment may not serve as a double jeopardy bar to the extent the court may not sort out whether a jury's verdict related to misleading [law

enforcement officers] or misleading the grand jury," makes no logical sense. RAI(86-87,92). Given that it found there was "no question" that the Commonwealth would be barred from prosecuting Gentry-Mitchell a second time on the false report charges after those indictments were amended "to describe the two police reports as part of a pattern or course of a single crime," RAI(84), it is unclear why the misleading charges should be treated differently. The proposed amended indictment would charge the same crime, with the same elements, and same specifications set forth in the original indictment, adding only the means or method of commission by "single pattern, scheme, or course of conduct." This point holds just as true in Sullivan's case as in Gentry-Mitchell's. The proposed amendments would not alter any essential elements of the crime of misleading investigators, and such a re-prosecution of the same crime under an amended theory (with all of the alleged facts, elements, and key details unchanged) would undoubtedly be barred by double jeopardy principles.⁸

An amendment to add the theory or means of commission by "single pattern, scheme, or course of conduct," would therefore be a matter of form, wholly unlike

⁸ The proposed amendment to allege a "single pattern, scheme, or course of conduct," would also resolve the issue of alleging multiple dates of offense with the disjunctive, "or," because it would make clear the reality (as presented to the grand jury) that the multiple acts of misleading were in fact part of the same single criminal offense, not several separate or distinct crimes.

amendments of substance, which raise constitutional questions. Cf. Murphy, 415 Mass. at 164-66 (where bribery indictment charged defendant with committing crime in every conceivable way, amendment at trial substituting word "or" for word "and" to demonstrate that Commonwealth need only prove commission of the crime by any one of those ways, was one of form, and not substance); Commonwealth v. Pearson, 77 Mass. App. Ct. 95, 101-02 (2010) (where defendant was tried and convicted on one fraudulent transaction, but mistakenly indicted for a different fraud, which the "trial evidence convincingly demonstrated was committed by someone else, his codefendant," amendment to correct "mistake" was precluded and Barbosa required reversal); Commonwealth v. Williams, 73 Mass. App. Ct. 833, 836-39 (2009) (amendment one of substance where it adds or changes an essential element of the offense, or exposes defendant to a higher penalty) Commonwealth v. Ruidiaz, 65 Mass. App. Ct. 462, 464 (2006) (amendment to indictment may not change matters "essential to the description of the crime charged," and may not broaden charges against defendant). Here, the proposed amendments would not change any essential element of the misleading offenses, or broaden the charges, or expose defendants to any higher penalties.

This court has concluded that amendments raise matters of form and not substance, even when those amendments serve to expand the time period of the alleged offense, as long as the essential elements of the crime remain the same, and

the circumstances presented to the grand jury to secure the original indictment are unchanged. Commonwealth v. Bougas, 59 Mass. App. Ct. 368, 370-71, 370 n.1 (2003) (amendment to indictment expanding alleged time period of course of criminal conduct from six years to eight years, based on change in witness's memory presented on "eve of trial," held permissible as amendment of form with no prejudice to defendant's substantial rights); see also Megna, 59 Mass. App. Ct. at 514-15. The amendment proposed here would do no more than that, only specifying the theory or way by which the crime was committed, within the same period of time as originally indicted and in a manner entirely consistent with the evidence received by the Grand Jury. Such an amendment would be a matter of form, would work no prejudice to the defendants, and would not materially change the work of the grand jury. See Knight, 437 Mass. at 491-92.

Additionally, the trial court incorrectly suggested (without elaborating or citing any relevant authority) that the presence of multiple "targets" of Gentry-Mitchell's and Sullivan's misleading statements barred amendment of the indictments to explicitly charge a "single pattern, scheme, or course of conduct." RAI(86); cf. Commonwealth v. Bolden, 470 Mass. 274, 282-83, 282 n.6 (2014) (change in name of assault victim was matter of form, and did not materially change the work of the grand jury, because the name or identity of the victim was not an essential element to the crime charged); Smiley, 431 Mass. at 479-80

(although defendant assaulted two separate victims, single indictment did not offend Barbosa, where assaults were part of a single criminal episode); United States v. Smith, 555 F. Supp. 3d 563, 584, 586-87, n. 14 (N.D. Ill. 2021) (rejecting duplicity challenge to wire fraud indictment charging multiple fraudulent misrepresentations made to multiple financial institutions as part of a single scheme) (citing Berardi, 675 F.2d at 898). General Laws c. 268, § 13B, requires only that the defendant willfully misled "another person" who is a "judge, juror, grand juror, attorney, victim witness advocate, police officer, correction officer, federal agent, investigator, clerk, court officer, court reporter, court interpreter, probation officer or parole officer." G.L. c. 268, § 13B(b). The indictments here satisfied the statutory requirements by alleging that the defendants "did directly or indirectly, willfully mislead a police officer, [federal agent,] investigator, or grand juror with the intent to impede, obstruct, delay, harm, punish or otherwise interfere thereby with a criminal proceeding." RAI(39,41). There is simply no authority to support the trial court's apparent belief that a defendant's misleading statement to one investigating authority cannot be part of the same pattern, scheme, or course of conduct as the same defendant's misleading statement to a different investigating authority. Not only is that possible and legally permissible, here—where the statements were substantially similar, and the intent the same, namely, to mislead anyone charged with investigating the same key facts and issues in the same

ongoing investigation—the evidence and circumstances presented to the grand jury demonstrated that defendants' statements to SPD and FBI investigators and to the grand jury were all part of the same single criminal offense. See Murray, 401 Mass. at 772-774; Stasiun, 349 Mass. 38, 44-45; England, 350 Mass. at 87; Megna, 59 Mass. App. Ct. at 514-15.

Thus, the trial court's ruling that the indictments for misleading could not be amended as proposed, and the that "only remedy is dismissal," was legal error, and its refusal to amend the indictments on that erroneous basis was an abuse of its discretion.

CONCLUSION

For the reasons set forth above, the trial court's orders dismissing the indictments should be reversed, and the cases should be remanded for further proceedings.

Respectfully submitted,

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Date: July 1, 2022

CERTIFICATE OF COMPLIANCE

I, Jared B. Cohen, hereby certify that the foregoing brief complies with all of the rules of court that pertain to the filing of briefs, including, but not limited to, the requirements imposed by Rules 16 and 20 of the Massachusetts Rules of Appellate Procedure. The brief complies with the applicable length limit in Rule 20 because it contains 10,994 words in 14-point Times New Roman font (not including the portions of the brief excluded under Rule 20), as counted in Microsoft Word (version: Word 2016).

/s/ Jared B. Cohen
Jared B. Cohen
BBO No. 689217
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2022, I filed with the Appeals Court and served the attached Record Appendix of the Appellant in Commonwealth v. Joseph B. Sullivan, No. 2022-P-0322, and Commonwealth v. Derrick C. Gentry-Mitchell, No. 2022-P-0323, through the electronic means provided by the clerk on the following registered users:

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ADDENDUM

G.L. c. 268, § 13B57
G.L. c. 277, § 2058
Mass. R. Crim. P. 4(d)
Trial Court's Memorandum of Decision and Order of October 12, 2021, Dismissing Gentry-Mitchell Indictment No. 1979CR00345-260
Trial Court's Memorandum of Decision and Order of October 15, 2021, Dismissing Sullivan Indictment No. 1979CR00344-270
Commonwealth v. DeCosta, 2015 WL 1376538, 87 Mass. App. Ct. 1112 (Mar. 27, 2015) (Rule 1:28 disposition)74
Commonwealth v. Jenkins, No. BRCR2013–01141, 2014 WL 6646473 (Mass. Super. Ct. Oct. 10, 2014)
Commonwealth v. Kulikov, 2009 WL 259137, 73 Mass. App. Ct. 1119 (Feb. 5, 2019) (Rule 1:28 disposition)83
Commonwealth v. Quadros, 2012 WL 1172186, 81 Mass. App. Ct. 1128 (Apr. 10, 2012) (Rule 1:28 disposition)85
Commonwealth v. Ravellette, 2009 WL 1442014, 74 Mass. App. Ct. 1113 (May 26, 2009) (Rule 1:28 disposition)86
Commonwealth v. Straker, 2015 WL 5458049, 88 Mass. App. Ct. 1105 (Sept. 8, 2015) (Rule 1:28 disposition)90
United States v. Fernandez, 389 Fed. Appx. 194, 2010 WL 2842854 (3d Cir. 2010) (unpublished)

MASSACHUSETTS GENERAL LAWS

CHAPTER 268 CRIMES AGAINST PUBLIC JUSTICE

SECTION 13B Intimidation of witnesses, jurors and persons furnishing information in connection with criminal proceedings

- (a) As used in this section, the following words shall have the following meanings unless the context clearly requires otherwise:--
- "Investigator", an individual or group of individuals lawfully authorized by a department or agency of the federal government or any political subdivision thereof or a department or agency of the commonwealth or any political subdivision thereof to conduct or engage in an investigation of, prosecution for, or defense of a violation of the laws of the United States or of the commonwealth in the course of such individual's or group's official duties.
- "Harass", to engage in an act directed at a specific person or group of persons that seriously alarms or annoys such person or group of persons and would cause a reasonable person or group of persons to suffer substantial emotional distress including, but not limited to, an act conducted by mail or by use of a telephonic or telecommunication device or electronic communication device including, but not limited to, a device that transfers signs, signals, writing, images, sounds, data or intelligence of any nature, transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photo-optical system including, but not limited to, electronic mail, internet communications, instant messages and facsimile communications.
- (b) Whoever willfully, either directly or indirectly: (i) threatens, attempts or causes physical, emotional or economic injury or property damage to; (ii) conveys a gift, offer or promise of anything of value to; or (iii) misleads, intimidates or harasses another person who is a: (A) witness or potential witness; (B) person who is or was aware of information, records, documents or objects that relate to a violation of a criminal law or a violation of conditions of probation, parole, bail or other court order; (C) judge, juror, grand juror, attorney, victim witness advocate, police officer, correction officer, federal agent, investigator, clerk, court officer, court reporter, court interpreter, probation officer or parole officer; (D) person who is or was attending or a person who had made known an intention to attend a proceeding described in this section; or (E) family member of a person described in this section, with the intent to or with reckless disregard for the fact that it may; (1)

impede, obstruct, delay, prevent or otherwise interfere with: a criminal investigation at any stage, a grand jury proceeding, a dangerousness hearing, a motion hearing, a trial or other criminal proceeding of any type or a parole hearing, parole violation proceeding or probation violation proceeding; or an administrative hearing or a probate or family court proceeding, juvenile proceeding, housing proceeding, land proceeding, clerk's hearing, court-ordered mediation or any other civil proceeding of any type; or (2) punish, harm or otherwise retaliate against any such person described in this section for such person or such person's family member's participation in any of the proceedings described in this section, shall be punished by imprisonment in the state prison for not more than 10 years or by imprisonment in the house of correction for not more than 2 ½ years or by a fine of not less than \$1,000 or more than \$5,000 or by both such fine and imprisonment. If the proceeding in which the misconduct is directed at is the investigation or prosecution of a crime punishable by life imprisonment or the parole of a person convicted of a crime punishable by life imprisonment, such person shall be punished by imprisonment in the state prison for not more than 20 years or by imprisonment in the house of corrections for not more than 2 ½ years or by a fine of not more than \$10,000 or by both such fine and imprisonment. (c) A prosecution under this section may be brought in the county in which the

CHAPTER 277 INDICTMENTS AND PROCEEDINGS BEFORE TRIAL

criminal investigation, trial or other proceeding was being conducted or took place or in the county in which the alleged conduct constituting the offense occurred.

SECTION 20 Time and place of commission of crime

The time and place of the commission of the crime need not be alleged unless it is an essential element thereof. The allegation of time in the caption shall, unless otherwise stated, be considered as an allegation that the act was committed before the finding of the indictment, after it became a crime, and within the period of limitations. The name of the county and court in the caption shall, unless otherwise stated, be considered as an allegation that the act was committed within the territorial jurisdiction of the court. All allegations of the indictment shall, unless otherwise stated, be considered to refer to the same time and place.

MASSACHUSETTS RULES OF CRIMINAL PROCEDURE

Rule 4. Form and Contents of Complaint or Indictment; Amendment

(Applicable to District Court and Superior Court)

- (a) Contents of Indictment or Complaint. An indictment and a complaint shall contain a caption as provided by law, together with a plain, concise description of the act which constitutes the crime or an appropriate legal term descriptive thereof.
- **(b) Subscription of Application for Issuance of Process.** An application for issuance of process may be subscribed by the arresting officer, the police chief, or any police officer within the jurisdiction of a crime, a prosecutor, or a private person.
- **(c) Indictment Based Upon Secondary Evidence.** An indictment shall not be dismissed on the grounds that the evidence presented before the grand jury consisted in whole or in part of the record from the defendant's probable cause hearing or that other hearsay evidence was presented before the grand jury.
- (d) Amendment. Upon his own motion or the written motion of either party, a judge may allow amendment of the form of a complaint or indictment if such amendment would not prejudice the defendant or the Commonwealth.

Massachusetts Appeals Court Case: 2022-P-0322 Filed: 7/6/2022 4:41 PM

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPERIOR COURT INDICTMENT NOS. 1979CR00164 & 1979CR003451)

COMMONWEALTH

HAMPDEN COUNTY SUPERIOR COURT FILED

vs.

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DERRICK GENTRY-MITCHELL

CLERK OF COURTS

MEMORANDUM OF DECISION AND ORDER

1. Introduction

On March 27, 2019, a statewide grand jury indicted the defendant, Springfield police officer, Derrick Gentry-Mitchell, with making a false report in violation of G.L. c. 269, § 13A (Action No. 1979CR00164, charge 1); perjury in violation of G.L. c. 268, § 1 (Action No. 1979CR00345, charge 1); and misleading in violation of G.L. c. 268, § 13B (Action No. 1979CR00345, charge 2). The false police report charge stems from two written reports Gentry-Mitchell submitted within the police department on July 22, 2015 and August 16, 2015, concerning events which occurred in the early morning of April 8, 2015. The perjury charge stems from Gentry-Mitchell's testimony before the grand jury on February 22, 2018. The misleading charge stems from the two written reports Gentry-Mitchell submitted within the

Indictment 1979CR00345 was issued as Commonwealth v. Gentry-Mitchell, Worcester docket number 1985CR00111. For ease of administration and to facilitate the filing of relevant materials in the Hampden County Superior Court, it has been given the Hampden County Superior Court docket number 1979CR00345.



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police department on July 22, 2015 and August 16, 2015, as well as Gentry-Mitchell's grand jury testimony on February 22, 2018.²

Gentry-Mitchell has moved to dismiss the false report indictment (Action No. 1979CR00345, charge 2), contending that they were the result of a flawed grand jury proceeding in violation of his rights under art. 12 of the Massachusetts Declaration of Rights (providing that no one may be convicted of a crime punishable by a term in State prison without first being indicted for that crime by a grand jury). He argues that because the false report indictment charges Gentry-Mitchell with committing offenses on either July 22, 2015, or August 16, 2015, and the misleading indictment charges Gentry-Mitchell with committing offenses on either July 22, 2015, or August 16, 2015, or February 22, 2018, it is impossible to know if the grand jury found probable cause to indict Gentry-Mitchell on the basis of all of those dates, either of those dates, or if the grand jury split their votes between certain dates such that there was no probable cause to indict with respect to

² Indictment 1979CR00164-1 reads as follows: "At the Superior Court, begun and holden at Worcester, within and for the County of Worcester, on the first Monday of March 2019, the STATEWIDE GRAND JURORS for the Commonwealth of Massachusetts on their oath present that: DERRICK GENTRY-MITCHELL defendant herein, of Springfield, in the County of Hampden, on or about the 22nd day of July in the year two thousand fifteen at Springfield, in the County of Hampden, or on or about the 16th day of August in the year two thousand fifteen at Springfield, in the County of Hampden aforesaid, did intentionally and knowingly make or cause to be made a false report of a crime to police officers. A True Bill." The indictment bears the number 19-164-1, the heading Making False Report G. L. c. 269, § 13A, and the date of attestation of March 27, 2019.

Indictment 1985CR00345-2 reads as follows: "At the Superior Court, begun and holden at Worcester, within and for the County of Worcester, on the first Monday of March 2019, the STATEWIDE GRAND JURORS for the Commonwealth of Massachusetts on their oath present that: DERRICK GENTRY-MITCHELL on or about the 22nd day of July in the year two thousand fifteen at Springfield, in the County of Hampden aforesaid, or on or about the 16th day of August in the year two thousand fifteen at Springfield, in the County of Hampden aforesaid, or on about the 22nd day of February in the year two thousand eighteen at Worcester, in the County of Worcester did directly or indirectly, willfully mislead a police officer, investigator or grand juror with the intent to impede, obstruct, delay, harm, punish or otherwise interfere thereby with a criminal proceeding. Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. A true bill." The indictment bears the number 19-345-2, the heading Misleading, and the date of attestation of March 27, 2019.

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any of the dates. In reliance upon *Commonwealth* v. *Barbosa*, 421 Mass. 547, 554 (1995),³ Gentry-Mitchell contends that the only adequate remedy is dismissal. The Commonwealth opposes the motion and argues that the indictments can be fairly read to allege that Gentry-Mitchell's actions are part of a scheme or single course of conduct. In the alternative, the Commonwealth moves the court to amend the indictments to that effect.

For the reasons set forth below, Gentry-Mitchell's motion to dismiss is **DENIED** as to 1979CR00164-1 (false police report) and **ALLOWED** as to 1985CR00345-2 (misleading).

2. Background

The charges are grounded in allegedly false statements and omissions of facts in Gentry-Mitchell's written reports, including (1) the statement in his July 22, 2015, report to Captain Trent Duda, Detective Unit, that one of the victims told him, with regard to the assailants, only that they were "white boys" and that none of the victims "wold [sic] provide Officers with a better description;" and (2) the statement in his August 16, 2015, report to Commissioner Barbieri, Internal Investigation Unit, that he did not "recall there being any mention of off-duty Officers"; and (3) the omission from both reports that he saw Diaz at Nathan Bill's after the Murphy's Pop Shop assault. Gentry-Mitchell testified before the grand jury on February 22, 2018.

³ Gentry-Mitchell does not argue that dismissal is in order based upon the inclusion of a third date, February 22, 2018, which is the date he testified before the grand jury.

⁴ The underlying facts as set forth in Gentry-Mitchell's testimony before the grand jury on February 22, 2018, are set forth in my Memorandum of Decision and Order on Gentry-Mitchell's Motion to Dismiss, dated January 15, 2020, and are not repeated herein.

3. Discussion

A. 1979CR00164-1 (False Police Report)

The indictment for false police report does not specifically allege alternative means of committing the crimes nor does it expressly allege that Gentry-Mitchell's acts were part of a pattern, scheme, or continuing offense which occurred on two separate days. Instead, the indictment alleges that Gentry-Mitchell made a false police report on either July 22, 2015, or August 16, 2015.

In Commonwealth v. Barbosa, 421 Mass. 547 (1995), the defendant was indicted in one count for distributing drugs on March 16, 1992, but there was evidence before the grand jury that the defendant had engaged in two drug transactions that day. *Id.* at 550. It was therefore unclear whether the grand jury found probable cause to indict the defendant for one of those transactions but not the other, or whether the grand jury intended the indictment to encompass both of them. *Id.* At trial, the Commonwealth presented evidence of both March 16th transactions, and the jury found the defendant guilty.

On appeal, the Supreme Judicial Court reversed Barbosa's convictions based on the March 16th incidents because "there is a substantial risk that the defendant was convicted of a crime for which he was not indicted." *Id.* at 554. The court reasoned that the jury may have reached a unanimous verdict on a March 16th transaction different than the March 16th transaction for which the grand jury indicted him. See *id.* at 552.

Although *Barbosa* is not identical to the charges of false police report before me, the same underlying question exists with respect to which of the two incidents was the basis for the indictments. The grand jury was not asked to specify whether there was probable cause to indict on the basis of the July or the August reports, nor does the indictment frame the alleged conduct

of writing the two police reports as a single scheme or pattern. The evidence before the grand jury does not obviously point to only one date as the basis of the indictments. See *id.* at 548-550. Contrast *Commonwealth* v. *Dean*, 109 Mass. 349, 351 (1972) (all parties knew from history of indictment which specific incident was basis for indictment, so trial judgment could have protected defendant's art. 12 rights by instructing jury to render verdict on only one factual incident which was basis for indictment); *Commonwealth* v. *Spencer*, 53 Mass. App. Ct. 45, 50 (2001) (although grand jury heard evidence of two drug transactions and defendant was indicted on a single count of selling drugs within school zone, evidence before grand jury only supported one of those transactions as basis for charge because grand jury only heard evidence of school location with respect to one of two drug deals). Nor is this a situation in which a statutory construction can cure an ambiguous indictment.⁵

The Commonwealth denies that the indictments are flawed and asserts that the grand jury were presented with evidence that Gentry-Mitchell participated in a single scheme, course of conduct, or continuing offense to mislead his superiors in the Springfield Police Department. It moves the court to amend the indictments to reflect the ongoing nature of the offense and that Gentry-Mitchell committed it on diverse dates. Under Mass. R. Crim. P. 4(d), a judge has discretion to allow an amendment of an indictment if the amendment is one of form rather than substance and if the amendment will not prejudice either the defendant or the Commonwealth.

In Commonwealth v. Dingle, 73 Mass. App. Ct. 274 (2008), the defendant was charged with and convicted of violating G. L. c. 272, § 29B, by distributing or possessing with intent to distribute materials either depicting children in a state of nudity or depicting children engaged in sexual conduct. The defendant argued that the indictments impermissibly charged him with two crimes in the alternative (i.e., whether the children in the images were nude or engaging in sexual activity), and that he was potentially convicted of a crime for which he was not indicted. Section 29B establishes, in paragraphs (a) and (b), two different means of committing the same offense: paragraph (a) refers to images of children in a statue of nudity, whereas paragraph (b) refers to images of children engaged in sexual conduct. Because both provisions related to the same subject matter, they were intended by the Legislature to be read as a single crime which could be committed by disseminating either type of image. See Dingle, 73 Mass. App. Ct. at 278-280. As a result, the indictment was not defective.

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Commonwealth v. Miranda, 441 Mass. 783, 787 (2004). Moreover, "Article 12 adds the requirement that the amendment not materially change the work of the grand jury." *Id.* (citations, quotations and ellipses omitted).

The first question is whether the proposed amendment to both indictments would be one of form or substance. Matters of form are not essential to the description of the crime charged. *Commonwealth* v. *Knight*, 437 Mass. 487, 492 (2002). "One test for determining whether an amendment is a matter of form or one of substance is whether a conviction on the original indictment would bar the subsequent prosecution of the defendant based on the amended indictment." *Id.* at 493. That test, applied here, demonstrates that the proposed amendment to the two indictments is one of form rather than substance. If Gentry-Mitchell had been tried for the charges based on the original indictments, there is no question that the Commonwealth would be barred from prosecuting him again for the same charges if the indictments were amended to describe the two police reports as part of a pattern or course of a single crime.

Gentry-Mitchell's reports were both written for the Springfield Police Department and formed part of a single criminal episode. That one report was intended for the Major Crimes Division and the other for the Internal Affairs Unit of the Springfield Police Department is immaterial. The grand jury heard testimony establishing that Gentry-Mitchell submitted both reports in conjunction with Springfield Police Department's ongoing investigation. In light of the similarities in Gentry-Mitchell's police reports and in the context of the police investigation herein, the amendment relates to a single criminal episode and is a matter of form. See *Commonwealth v. Crowder*, 49 Mass. App. Ct. 720, 721-722 (2000); Commonwealth v. Snow, 269 Mass. 598 (1980); Commonwealth v. Baker, 10 Mass. App. Ct. 852 (1980).

The next issue is whether the proposed amended indictments would prejudice Gentry-Mitchell. A defendant is not prejudiced by an amendment if the language of each indictment informs the defendant of the charges against him. See *Commonwealth* v. *Murphy*, 415 Mass. 161, 165 (1993) (no prejudice from amendment changing "and" to "or" in bribery indictment). In this case, both the original and proposed amended indictments adequately informed Gentry-Mitchell of the charges against him, based on his two police reports. Further, the Commonwealth provided Gentry-Mitchell a bill of particulars delineating the charges against him. The proposed amendment would not expose Gentry-Mitchell to an increased penalty or add an essential element of the offense. Contrast *Commonwealth* v. *Williams*, 73 Mass. App. Ct. 833, 837 (2009) (amendment exposed defendant to increased maximum penalty and added an essential element of offense). It follows that the proposed amended indictments would not prejudice the defendant.

The last question is whether the proposed amendments would materially change the work of the grand jury. The circumstances of the crimes, and particularly the two police reports authored by Gentry-Mitchell, remain unchanged. The alleged criminal conduct occurred in the same way by the same person. See *Knight*, 437 Mass. at 484. The two reports were made as part of the Springfield Police Department's investigation. The fact that the two reports were made over a period of approximately three weeks separately to the Major Crimes Division and Internal Affairs Unit does not separate the offenses, as Gentry-Mitchell alleges. That the indictments treat the two police reports as a single course of conduct, scheme, or pattern would not materially alter the grand jury's work. See *id*.

Because amending the indictments as proposed by the Commonwealth would be only a matter of form, would not prejudice the defendant, and would not materially change the grand

jury's work, I exercise my discretion to allow the amendment and deny Gentry-Mitchell's motion to dismiss the false police report indictment. See *Miranda*, 441 Mass. at 787.

B. 1985CR00345-2 (Misleading)

The indictment of misleading, on the other hand, is problematic. General Laws c. 268, § 13B, provides, in pertinent part, "[w]hoever, directly or indirectly, willfully... misleads ... a ... grand juror, prosecutor, police officer, ... [or] investigator ... with the intent to impede, obstruct, delay, harm, punish or otherwise interfere thereby ... with [a criminal investigation, grand jury proceeding [or] other criminal proceeding of any type] shall be punished...." G.L. c. 268, § 13B (1) (c) (iii) & (v) (effective November 4, 2010, to April 12, 2018). An element of the crime of misleading is that a "grand juror, prosecutor, police officer, ... [or] investigator ..." be misled. Here, the indictment reflects testimony the grand jury heard relating to the two police reports Gentry-Mitchell made to the Springfield police as well as Gentry-Mitchell's testimony before the grand jury itself. It is impossible to discern whether the grand jury indicted Gentry-Mitchell for his actions relating to his reports to the Springfield Police Department or to the grand jury.

Unlike the indictment for false police report, the existence of two distinct targets of Gentry-Mitchell's alleged misrepresentation – the police on the one hand, and the grand jurors on the other – falls squarely within the ruling in *Barbosa, supra*. As in *Barbosa,* it is unclear whether the grand jury found probable cause to indict Gentry-Mitchell for one of those transactions but not the other, or whether the grand jury intended the indictment to encompass both of them. *Barbosa,* 421 Mass. at 550. Applying the double jeopardy test articulated in *Barbosa,* a conviction on the existing indictment may not serve as a double jeopardy bar to the extent the court may not sort out whether a jury's verdict related to misleading the Springfield

police or misleading the grand jury.

The misleading indictment stretches impermissibly thin the Commonwealth's motion that I amend the indictment to allege a single pattern, scheme or course of conduct relating to one target, such as law enforcement officials. The only remedy is dismissal of indictment 1985CR00345-2 (misleading).

ORDER

- **A.** For the foregoing reasons, it is hereby **ORDERED** as follows:
 - The Defendant Gentry-Mitchell's Motion to Join the Motion to Dismiss Filed in Shavonne Lewis as to the Violation of Article 12 Rights Amended on October 7, 2021, and Highlighted on Page Two is <u>DENIED</u> as to 1979CR00164-1 (False Police Report).
 - The Commonwealth's Motion to Amend the Indictments is <u>ALLOWED</u> as to 1979CR00164-1 (False Police Report). Indictment 1979CR00164-1 is <u>AMENDED</u> as follows:

"At the Superior Court, begun and holden at Worcester, within and for the County of Worcester, on the first Monday of March 2019, the STATEWIDE GRAND JURORS for the Commonwealth of Massachusetts on their oath present that: DERRICK GENTRY-MITCHELL defendant herein, of Springfield, in the County of Hampden, on or about the 22nd day of July in the year two thousand fifteen at Springfield, in the County of Hampden, or on or about the 16th day of August in the year two thousand fifteen at Springfield, in the County of Hampden aforesaid, did thereby engage in a single pattern, scheme, or course of conduct to intentionally and knowingly make or cause to be made a false report of a crime to police officers. A True Bill."

4. The Commonwealth's motion to amend Indictment 1979CR00345-2 (Misleading) is **DENIED**.

Justice of the Superior Court

Dated: October 12, 2021

Massachusetts Appeals Court Case: 2022-P-0322 Filed: 7/6/2022 4:41 PM

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPERIOR COURT INDICTMENT NO. 1979CR00344¹

COMMONWEALTH

VS.

JOSEPH SULLIVAN

MEMORANDUM OF DECISION AND ORDER

1. Introduction

On March 27, 2019, a statewide grand jury indicted the defendant, Springfield police officer Joseph Sullivan, with perjury in violation of G.L. c. 268, § 1 (Action No. 1979CR00344, charge 1); and misleading in violation of G.L. c. 268, § 13B (Action No. 1979CR00344, charge 2). The perjury charge stems from Sullivan's testimony before the grand jury on March 15, 2018. The misleading charge stems from the statements Sullivan made on June 19, 2015, February 24, 2017, May 16, 2017, as well as Sullivan's grand jury testimony on March 15, 2018, and statements he made to law enforcement during an interview on March 15, 2018, preceding his grand jury testimony.²

² Indictment 1979CR00344-2 reads as follows: "At the Superior Court, begun and holden at Worcester, within and for the County of Worcester, on the first Monday of March in the year two thousand nineteen, the STATEWIDE GRAND JURORS for the Commonwealth of Massachusetts on their oath present that: JOSPEH SULLIVAN on or about the 19th of June in the year two thousand fifteen at Springfield, in the County of Hampden aforesaid, or on or about the 24th day of February in the year two thousand seventeen at Springfield, in the County of Hampden aforesaid, or on about the 15th day of March in the year two thousand eighteen at Worcester, in the County of Worcester did directly or indirectly, willfully mislead a police officer, federal agent, investigator or grand juror with the intent to impede, obstruct, delay, harm, punish or otherwise interfere thereby with a criminal proceeding. Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. A true bill." The indictment bears the number 19-344-2, the heading Misleading, and the date of attestation of March 27, 2019.



19 Emery 19/201

¹Indictment 1979CR00344 was issued as *Commonwealth* v. *Sullivan*, Worcester docket number 1985CR00110. For ease of administration and to facilitate the filing of relevant materials in the Hampden County Superior Court, it has been given the Hampden County Superior Court docket number 1979CR00344.

Sullivan has moved to dismiss the misleading indictment (Action No. 1979CR00344, charge 2) contending that it was the result of a flawed grand jury proceeding in violation of his rights under art. 12 of the Massachusetts Declaration of Rights (providing that no one may be convicted of a crime punishable by a term in State prison without first being indicted for that crime by a grand jury). He argues that because the misleading indictment charges Sullivan with committing offenses on either June 19, 2015, February 24, 2017, May 16, 2017, or March 15, 2018, it is impossible to know if the grand jury found probable cause to indict Sullivan on the basis of all of those dates, some of those dates, or if the grand jury split their votes between certain dates such that there was no probable cause to indict with respect to any of the dates. In reliance upon *Commonwealth* v. *Barbosa*, 421 Mass. 547, 554 (1995), Sullivan contends that the only adequate remedy is dismissal. The Commonwealth opposes the motion and argues that the indictments can be fairly read to allege that Sullivan's actions are part of a scheme or single course of conduct. In the alternative, the Commonwealth moves the court to amend the indictments to that effect.

For the reasons set forth below, Sullivan's motion to dismiss is <u>ALLOWED</u> as to 1985CR00344-2 (misleading).

2. Background

The misleading charge stems from statements Sullivan made as follows: 1. to members of the Springfield Police Department on June 19, 2015; 2. to agents from the Federal Bureau of Investigation (the "FBI") on February 24, 2017, and May 16, 2017; 3. to members of the Massachusetts State Police, the FBI and the Attorney General's Office during an interview preceding his grand jury testimony on March 15, 2018; and 4. to grand jurors during his

testimony before the grand jury on March 15, 2018.3

3. Discussion

General Laws c. 268, § 13B, provides, in pertinent part, "[w]hoever, directly or indirectly, willfully... misleads ... a ... grand juror, prosecutor, police officer, ... [or] investigator ... with the intent to impede, obstruct, delay, harm, punish or otherwise interfere thereby ... with [a criminal investigation, grand jury proceeding [or] other criminal proceeding of any type] shall be punished...." G.L. c. 268, § 13B (1) (c) (iii) & (v). An element of the crime of misleading is that a "grand juror, prosecutor, police officer, ... [or] investigator ..." be misled. Here, the indictment reflects testimony the grand jury heard relating to the statements Sullivan made either to members of the Springfield Police Department on June 19, 2015, or to agents from the FBI on February 24, 2017 and/or May 16, 2017, or to members of the Massachusetts State Police, the FBI and the Attorney General's Office during an interview preceding his grand jury testimony on March 15, 2018, or as a result of Sullivan's testimony before the grand jury itself on March 15, 2018. It is impossible to discern whether the grand jury indicted Sullivan for his actions relating to his reports to the Springfield Police Department, the FBI, the Massachusetts State Police, the FBI and the Attorney General's Office or to the grand jury.

The existence of multiple targets of Sullivan's alleged misrepresentation falls squarely within the ruling in *Barbosa*, *supra*. As in *Barbosa*, it is unclear whether the grand jury found probable cause to indict Sullivan for one of those transactions but not the other, or whether the grand jury intended the indictment to encompass both of them. *Barbosa*, 421 Mass. at 550.

³ The underlying facts as set forth in Sullivan's testimony before the grand jury on March 15, 2018, are set forth in my Memorandum of Decision and Order on Sullivan's Motion to Dismiss, dated January 9, 2020, and are not repeated herein.

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Applying the double jeopardy test articulated in *Barbosa*, a conviction on the existing indictment may not serve as a double jeopardy bar to the extent the court may not sort out whether a jury's verdict relates to misleading law enforcement conducting the subject investigation, on the one hand, or misleading a grand juror, on the other.

The misleading indictment stretches impermissibly thin the Commonwealth's motion that I amend the indictment to allege a single pattern, scheme or course of conduct relating to one target, such as law enforcement officials. The only remedy is dismissal of indictment 1979CR00344-2 (misleading).

ORDER

For the foregoing reasons, Defendant Sullivan's Motion to Dismiss Pursuant to *Commonwealth* v. *Barbosa* is **ALLOWED** as to 1979CR00344-2 (Misleading). The Commonwealth's motion to amend 1979CR00344-2 is **DENIED**.

Mark D Mason

Justice of the Superior Court

Dated: October 15, 2021

87 Mass.App.Ct. 1112 Unpublished Disposition NOTICE: THIS IS AN UNPUBLISHED OPINION. Appeals Court of Massachusetts.

COMMONWEALTH
v.
Kevin M. DeCOSTA.

No. 13–P–1543.

| March 27, 2015.

By the Court (KANTROWITZ, GREEN & SULLIVAN, JJ. ⁶).

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

*1 The defendant, Kevin M. DeCosta, appeals his convictions of seven counts of indecent assault and battery of a child under fourteen and one count of rape of a child with force. He contends that (1) ambiguity in the indictments created the possibility that he may have been convicted of crimes for which he was not indicted, and (2) the prosecutor's closing argument misstated the evidence and improperly appealed to the jury's sympathies. We affirm.

Discussion. Correlation between the indictments and convictions. ¹ The defendant contends that the indictments against him were ambiguous and that he may have been convicted of crimes for which he was not indicted, in violation of art. 12 of the Declaration of Rights of the Massachusetts Constitution. The defendant did not raise this issue at trial. ² Our review is therefore limited to whether any defect in the indictments created a substantial risk of a miscarriage of justice. See **Commonwealth v. Fernandes, 430 Mass. 517, 521 n. 13 (1999); Commonwealth v. Gonzalez, 22 Mass.App.Ct. 274, 283–284 (1986).

A defendant may not be convicted of a crime for which he was not indicted. See *Commonwealth v. Barbosa*, 421 Mass 547, 550–551 & n .6 (1995). The defendant contends that the testimony before the grand jury contained a generalized description of digital and penile touching of the child's body,

vagina, and anus, and that the ambiguity permitted the jury to convict the defendant of crimes for which he was not indicted. ³ This contention is unpersuasive because, as is discussed below, the challenged indictments either alleged an ongoing course of conduct, or were sufficiently distinct. Moreover, the Commonwealth's proof at trial tracked the indictments, and the jury were properly instructed.

The grand jury heard the testimony of the investigating officer and listened to the child's SAIN interview. The defendant cared for the child while she was recovering from a tonsillectomy, at which time the events in question occurred. The evidence before the grand jury detailed a continuous course of indecent touchings over the two-week period between December 16, 2011, and January 1, 2012, and further conduct on both December 16, 2011, and January 1, 2012. See note 3, *supra*. The indictments tracked the corresponding statutory language, see **Commonwealth v. Robertson, 408 Mass. 747, 749 (1990), but did not include the specific means, and in one instance gave a range of approximate dates.

With respect to sexual abuse charges involving minors, "[p]rosecutors ... frequently allege ... multiple acts of child sexual abuse by drafting numerous generic indictments or complaints differentiated only by the number assigned to the charge." Commonwealth v. Erazo, 63 Mass.App.Ct. 624, 627 (2005). 4 The indictments were not fatally defective for lack of specificity. The child testified at trial, providing a description of a course of events that tracked the indictments. She gave "reasonably detailed descriptions of various distinguishable forms of abuse but otherwise spoke largely in generalities. Her testimony, if believed, established that she had been the victim of a large number of criminal acts by the defendant." — Commonwealth v. Kirkpatrick, 423 Mass. 436, 443 (1996). Although there were some differences, discussed below, between the child's SAIN interview and trial testimony, the trial testimony regarding the abuse that occurred between December 16 and January 1 described an ongoing course of conduct, enumerating substantially the same events, and overlapped in almost all respects.

*2 The defendant contends that the grand jury may have indicted him for one form of touching or penetration, while the jury at trial convicted him on another, because the child gave descriptions of various touchings, and both digital and penile penetration between December 16 and January 1. As applied to the indictments charging indecent assault and battery over the two week period of time, this argument

overlooks the broad nature of the indictment, that is a "continuing offense occurring at several times and places over a period of time." Commonwealth v. Barbosa, 421 Mass. at 550–551 & n. 6, citing G.L. c. 272, § 32. See Commonwealth v. Conefrey, 420 Mass. 508, 511 n. 6 (1995) (indictment charging indecent assault and battery on a child under fourteen at "divers times and dates" did not prejudice defendant). With respect to those indictments covering the two-week time period, the defendant's reliance on Barbosa is therefore misplaced, as Barbosa (by contrast) dealt with an indictment which, on its face, referred to a single criminal act.

Similarly, the convictions for the multiple indecent assault and batteries and for the rape were sufficiently tied to the indictments. As noted above, the indecent assault and battery indictments were identical, following the statutory form, but not specifying the manner of the assault. Similarly, the rape indictments did not specify the manner in which the rape occurred. The child described multiple indecent touchings and a vaginal rape. The Commonwealth, however, was not "required to elect which act of intercourse it was relying on to prove the offense of rape," or which of the indecent touchings constituted an indecent assault and battery.

"Where a crime can be committed in any one of several ways, an indictment properly charges its commission in all those ways.... Then the defendant should be convicted if it is proved that he committed the crime in any of those ways."

Commonwealth v. Dowe, 315 Mass. 217, 219–220 (1943)."

Commonwealth v. Keevan, supra.

This is not to say that a jury may convict on diverse factual bases. "[W]here the Commonwealth brings a number of indictments against a defendant alleging child sexual abuse occurring at unspecified times or places, there is always the risk that jurors may vote to find the defendant guilty on a particular indictment, but with different incidents or conduct in mind. A reviewing court may uphold a conviction in such a case only where the record is clear that the jurors 'understood their duty unanimously to agree to a particular set of facts.' Commonwealth v. Conefrey, [supra at] 514" Commonwealth v. LaCaprucia, 429 Mass. 440, 446-447 (1999). The trial judge instructed the jury to render each verdict unanimously. Upon receipt of a question from the jury, the trial judge provided further clarification, instructing the jury, "You've heard testimony about the different allegations about different ways in which the alleged victim was

indecently touched. As to each indictment you have to be unanimously agreed as to the means by which this crime was committed, the manner in which those touchings occurred. You have to unanimously agree as to each indictment." The jury acquitted the defendant of seven counts, indicating that it heard and heeded the judge's instructions.

*3 Finally, the defendant contends that the evidence before the grand jury was insufficient to support a rape indictment based on anal penetration, but that the child changed her testimony at trial and more clearly stated that this form of penetration had occurred. Thus, the defendant claims, the conviction for rape, if based on anal penetration, may be based on conduct for which he was not indicted.

The statement contained in the SAIN interview played for the grand jury was that the defendant's "thing touched" her butt, "not really in it, but ... almost ... it ... hurt." At trial, the child stated that "his private spot" was touching her butt, moving back and forth, and it "hurt." The evidence before the grand jury was sufficient to support an indictment for anal rape. The child's statement that it "hurt" was sufficient to permit the grand jury to conclude that penetration had occurred. See

Commonwealth v. Nylander, 26 Mass.App.Ct. 784, 789 (1989). ⁵

Given the statutory form of the indictments, the continuous course of conduct covered by the indictments, the overlapping evidence before the grand jury and trial jury, the specific unanimity instruction, and the careful attention the jury gave to each indictment resulting in an acquittal on several of the charges, we find no substantial risk that the defendant was convicted of crimes for which he was not indicted.

Prosecutor's closing argument. The defendant contends that various statements made by the prosecutor during her closing argument misstated the evidence and improperly appealed to the jury's sympathies. "Because the defendant did not object to the statements at trial, we review to determine whether any error created a substantial risk of a miscarriage of justice."

Commonwealth v. Joyner, 467 Mass. 176, 188, (2014).

The defendant contends that the prosecutor misstated the evidence by exaggerating the number of indecent touchings and by stating that there was no dispute as to the touchings. The defendant also contends that the prosecutor referred to facts not in evidence when she referred to masturbation and ejaculation in her closing. We find no error. While

the prosecutor's statements may have contained some exaggeration or technical inaccuracies, the defendant did admit to indecently touching the child during the course of a police interview, and the prosecutor's statements were generally supported by evidence on the record or reasonable inferences drawn therefrom. See *Commonwealth v. Hoffer*, 375 Mass. 369, 378 (1978).

The defendant also contends that the prosecutor improperly appealed to juror sympathy when she said that the evidence showed that the defendant "used [the child] like a prostitute to satisfy his needs." Referring to the defendant's use of the child as a prostitute was better left unsaid. See generally

Commonwealth v. Kozec, 399 Mass. 514, 516–517 (1987);

Commonwealth v. Lewis, 465 Mass. 119, 129–130 (2013).

*4 Leaving aside the question of error, a defendant's challenge to a specific part of a closing argument is

analyzed in "the context of the whole argument, the evidence admitted at trial, and the judge's instructions to the jury." *Commonwealth v. Whitman*, 453 Mass. 331, 343 (2009). The trial judge gave both preliminary instructions and final instructions that closing arguments are not evidence. See

Commonwealth v. Farley, 432 Mass. 153, 157 (2000); Mass. G. Evid. § 1113(b)(1) (2015). Given these instructions and the quantum of evidence before the jury, we further conclude that even if the prosecutor's statement was error, it did not create a substantial risk of a miscarriage of justice.

Judgments affirmed.

All Citations

87 Mass.App.Ct. 1112, 28 N.E.3d 11 (Table), 2015 WL 1376538

Footnotes

- 6 The panelists are listed in order of seniority.
- The trial judge denied the defendant's motion to supplement the record on appeal because the impounded Sexual Assault Intervention Network (SAIN) interview at issue was not part of the trial record. However, the interview is relevant to the defendant's argument on appeal concerning the proceedings before the grand jury. The panel exercises its discretion to treat the appeal of the denial of that motion in the trial court as a motion to the panel to supplement the appellate record under Mass.R.A.P. 8, as amended, 430 Mass. 1601 (1999), and allows the motion.
- The Commonwealth argues that a challenge to the sufficiency of the indictment must be brought before trial, lest it be waived. See G.L. c. 277, § 47A; Mass.R.Crim.P. 13(c)(2), as appearing in 442 Mass. 1516 (2004). See also Commonwealth v. Hrycenko, 417 Mass. 309, 312 (1994) (defendant who does not object prior to trial to defect in indictment waives right to object unless cause is shown); Commonwealth v. Perry P., 418 Mass. 808, 817 n. 5 (1994) ("A nonjurisdictional issue capable of determination without a trial of the general issue must be raised before trial by motion"); Commonwealth v. Lamont L., 438 Mass. 842, 845 (2003); Commonwealth v. Bell, 455 Mass. 408, 412 n. 6 (2009) (" [A]II objections to an indictment must be raised prior to trial, and failure to raise such an objection by motion shall waive such objection). The claim presented here was one that arguably could not have been brought in advance of trial, as the contention is that the proof at trial did not correspond to the grounds for the grand jury indictment. However, no posttrial motion was brought, and we therefore treat the claim as unpreserved.
- The defendant was tried on the following indictments returned by the grand jury: five counts of indecent assault and battery occurring on January 1, 2012; five counts of indecent assault and battery occurring on December 16, 2011; one count of assault with intent to rape a child occurring on December 16, 2011; one

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count of rape of a child by force occurring on December 16, 2011; one count of rape of a child by force occurring between December 16, 2011, and January 1, 2012; and two counts of indecent assault and battery on a child under fourteen occurring between December 16, 2011, and January 1, 2012. The jury convicted the defendant of five counts of indecent assault and battery occurring on January 1, 2012; one count of rape of a child by force occurring between December 16, 2011, and January 1, 2012; and two counts of indecent assault and battery on a child under fourteen occurring between December 16, 2011, and January 1, 2012, but acquitted the defendant of the seven remaining charges.

- "[A]n indictment must contain a plain, concise description of the act which constitutes the crime or an appropriate legal term descriptive thereof." *Commonwealth v. Pearson,* 77 Mass.App.Ct. 95, 98 (2010) (quotation omitted). "[A]II that is required is that the indictment ... be sufficient to give the accused reasonable knowledge of the crime so as to enable him or her to prepare a defense." *Commonwealth v. Erazo, supra,* citing *Commonwealth v. Hrycenko, supra* at 313.
- The trial judge correctly instructed the jury that actual penetration was required for a conviction of natural or unnatural sexual intercourse, stating, "Either natural or unnatural intercourse is complete on penetration, no matter how slight, of a person's genital or anal opening. In addition to the vagina and female genital opening includes anterior parts known as the vulva and the labia. Penetration into the vagina itself is not required."

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Only the Westlaw citation is currently available.

Superior Court of Massachusetts,

COMMONWEALTH,

Bristol County.

v

Shayanna JENKINS.

No. BRCR2013-01141.

Oct. 10, 2014.

MEMORANDUM OF DECISION AND ORDER
ON DEFENDANT'S MOTION TO DISMISS
FOR INSUFFICIENT EVIDENCE AND FOR
IMPAIRING THE INTEGRITY OF THE GRAND JURY

E. SUSAN GARSH, Justice.

INTRODUCTION

*1 Shayanna Jenkins is charged with one count of perjury in violation of G.L. c. 268, § 1. She moves to dismiss the indictment on the grounds that the grand jury did not hear probable cause for that crime and the integrity of the proceeding was impaired. For the reasons discussed below, the motion to dismiss is *denied*.

BACKGROUND

On June 27, 2013, Jenkins appeared before the Bristol County Grand Jury ("Grand Jury") investigating the homicide of Odin Lloyd and asserted her Fifth Amendment right to remain silent. She was thereafter granted immunity from prosecution. Jenkins testified before the Grand Jury on August 13, 2013 and August 15, 2013. Her testimony for both days is set forth in approximately 217 pages of the grand jury transcript.

On September 26, 2013, Jenkins was charged with a single count of perjury. The indictment states that Jenkins:

On August 13, 2013, and/or August 15, 2013, at Fall River, in the County of Bristol aforesaid, being lawfully

required to depose the truth in a judicial proceeding or in a proceeding in a course of justice, did willfully swear or affirm falsely in a matter material to the issue or point in question, or being required by law to take an oath or affirmation did willfully swear or affirm falsely in a manner relative to which such oath or affirmation was required, in violation of G.L. c. 268, section 1.

Jenkins then moved for a bill of particulars. After that motion was allowed, the Commonwealth filed a bill of particulars listing twenty-nine instances of allegedly perjurious statements. In response to a court order that the Commonwealth disclose all direct evidence of perjury in its possession, on July 31, 2014, the Commonwealth stated that it has direct evidence with respect to fourteen of the allegedly perjurious statements.

DISCUSSION

Duplicity

Duplicity is the charging of several separate offenses in a single count. Commonwealth v. Barbosa, 421 Mass, 547. 553 n. 10 (1995). Jenkins argues that because the indictment charges a single count of perjury involving numerous separate acts, she may be convicted of a crime without having been indicted for that crime by a grand jury in violation of art. 12 of the Declaration of Rights. In Barbosa, the grand jury heard evidence that the defendant engaged in two entirely separate drug transactions; in each the defendant distributed cocaine to a different purchaser. Yet the grand jury returned only one count of distribution in the indictment. The indictment charged that the defendant did knowingly and intentionally distribute "a certain controlled substance." Id. at 548 n. 2. At trial, the prosecution again presented evidence of the two separate transactions. The Court found that, "on its face, the indictment appears to refer to a single act of distribution of cocaine...." Id. at 551. The Court pointed out that it was not dealing with a continuing offense occurring at several times and places over a period of time. Id. Accordingly the Court reversed the conviction on the grounds that there was a very

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real possibility that the defendant was convicted of a crime for which he was not indicted by the grand jury. Id. at 554.

*2 Generally, the Commonwealth is free to bring indictments in as many counts as it feels is appropriate in the circumstances, unless the form of the indictment infringes the substantial rights of the defendant. Commonwealth v. Murray, 401 Mass.771, 774 (1988) (successive takings of property actuated by a single, continuing criminal impulse or intent or pursuant to a general larcenous scheme may, but need not, be charged as one crime); Commonwealth v. Gurney, 13 Mass.App.Ct. 391, 399 n. 9 (1982). Where there is a continuing criminal episode, the Commonwealth has discretion to charge multiple acts in a single indictment. See Commonwealth v. Crowder, 49 Mass.App.Ct. 720, 721-722 (2000) (proper to charge single indictment for rape based on four separate acts of penetration of the same victim); Commonwealth v. Gurney, 13 Mass.App.Ct. at 403, 405 (suggesting that perjury need not be treated as a continuing offense but may be so viewed). The Court in Gurney noted that it has been the practice in Federal courts to charge perjury committed in the same proceeding as a one-count indictment with each false declaration set forth in a particular specification. Id. at 405 n. 13 (citations omitted). As long as the separate specifications set out different falsehoods, proof of any of the specifications is sufficient to support a verdict of guilty. Id. See also United States v. Fernandez, 389 Fed. Appx. 194, 199 (3d Cir.2010) (citing *United States v.* Berardi, 629 F.2d 723, 729 (2d Cir.1980), for the proposition that it is accepted practice to charge perjury before a grand jury committed in the course of the same appearance in a one-count indictment); United States v. Pagan-Santini, 451 F.3d 258, 266 & n. 2 (1st Cir.2006) (noting, in context of need for specific unanimity instruction, that government sometimes charges multiple perjuries in a single count).

Jenkins has not demonstrated that the form of the indictment infringes upon her substantial rights. The falsehoods all relate to the testimony given by Jenkins before the same grand jury in connection with its inquiry into who might be responsible for Lloyd's death and/or be accessories after the fact. By viewing her testimony to the Grand Jury as a continuing course of perjurious conduct, the Commonwealth has avoided problems with multiplicity and limited Jenkins's criminal exposure. The bill of particulars gives Jenkins notice of the factual predicate underlying the Commonwealth's case and restricts the Commonwealth's

therein. See Commonwealth v. Crawford, 429 Mass. 60, 69 (1999); Rogan v. Commonwealth, 415 Mass. 376, 378 (1993). At trial, the defendant will be entitled to a specific unanimity instruction indicating to the jury that they must be unanimous as to which specific statement constitutes the offense charged. See Commonwealth v. Shea, 467 Mass. 788, 798 (2014) (specific unanimity instruction warranted when, on a single charged offense, Commonwealth presents evidence of discrete acts, any one of which would suffice by itself to make out the crime charged). Accordingly, Jenkins's concerns with respect to duplicity do not require dismissal of the indictment.

Probable Cause

*3 In most cases, a court should not inquire into the adequacy or competency of the evidence upon which an indictment is based. **Commonwealth v. Moran, 453 Mass. 880, 883 (2009); *Commonwealth v. Coonan, 428 Mass. 823, 825 (1999). Nonetheless, fundamental fairness requires that a court dismiss an indictment where the grand jury receives no evidence of criminality on the part of the accused. **Commonwealth v. Moran, 453 Mass. at 884. In order for indictments to fulfil their traditional function as protection against unfounded criminal prosecutions, they must be supported by at least enough evidence to establish both the identity of the accused and probable cause to arrest her for the crime charged. **Commonwealth v. Hanright, 466 Mass. 303, 311 (2013); **Commonwealth v. McCarthy, 385 Mass. 160, 163 (1982).

Probable cause to arrest means reasonably trustworthy information sufficient to warrant a prudent person in believing that the defendant committed the charged offense. Commonwealth v. Hanright 466 Mass. at 312; Commonwealth v. McCarthy, 385 Mass. at 163. It requires more than mere suspicion but considerably less than the evidence required to warrant a conviction beyond a reasonable doubt. Commonwealth v. Humberto H., 466 Mass. 562, 565 (2013). Evidence that is insufficient to support a guilty verdict may be more than sufficient to establish probable cause. Id. Probable cause to sustain an indictment is a decidedly low standard, but the grand jury must be presented with evidence on each element of the crime

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charged. Commonwealth v. Hanright, 466 Mass. at 311–312.

Chapter 268, section 1 provides:

Whoever, being lawfully required to depose the truth in a judicial proceeding or in a proceeding in a course of justice, willfully swears or affirms falsely in a matter material to the issue or point in question, or whoever, being required by law to take an oath or affirmation, willfully swears or affirms falsely in a matter relative to which such oath or affirmation is required, shall be guilty of perjury.

This Court is not persuaded by the defendant's argument that, in order to sustain the indictment against a *McCarthy* challenge, the Court must separately analyze whether the Grand Jury had probable cause for each instance of alleged perjury set forth in the bill of particulars. The defense and the Commonwealth agree that no case stands for that proposition. The issue presented by the *McCarthy* motion is whether the evidence before the Grand Jury was adequate to establish the level of probable cause required to support an arrest. A single false statement that meets the elements of perjury is a sufficient basis on which to predicate an arrest. No more need be shown for the indictment to survive.

The Grand Jury heard probable cause to believe that Jenkins committed perjury. The elements of perjury are that the defendant made a statement under oath in a judicial proceeding, the statement was false, the defendant made the statement willfully and knew the statement was false when she made it, and the statement was material to the issue or point in question. Commonwealth v. Geromini, 357 Mass. 61, 63–64 (1970); Commonwealth v. White, 70 Mass. App. Ct. 71, 76 (2007). In assessing the sufficiency of the indictment, this Court must view the evidence in the light most favorable to the Commonwealth. Commonwealth v. Hanright, 466 Mass. at 305. Jenkins was asked, while testifying under oath before a grand jury, whether, after Lloyd's death, she had talked to Ernest Wallace. The grand jury was investigating Wallace as a potential co-venturer in Lloyd's murder and as a potential accessory after the fact. In response, she testified, "Not from my knowledge, no." However, the Grand Jury was presented with telephone records from Jenkins's phone and Wallace's phone which indicate that, on June 18th, there were eleven calls between them, starting around the time that Jenkins dropped Aaron Hernandez off at the North Attleboro Police Station. The grand jury had evidence that Jenkins had a motive to lie and that, at Hernandez's request, she had disposed of a heavy box. Viewed in the light most favorable to the Commonwealth, the evidence supports an inference that Jenkins probably made the statement wilfully and knew it was false when she testified. Knowledge may be inferred from the circumstantial evidence that reasonably tends to show that knowledge existed. "In perjury cases, such knowledge may be inferred from the falsity of the statement itself, as least if considered in relation to the facts relating to the defendant's opportunity to have knowledge." Commonwealth v. Giles. 350 Mass. 102, 112 (1966), overruled on other grounds, Commonwealth v. McDuffee, 379 Mass. 353 (1979). The questions posed to Jenkins regarding her communications with Wallace were directly within the scope of the grand jury inquiry. The test of relevancy and materiality for perjury is not whether the false testimony did in fact impede or otherwise influence the grand jury's investigation; rather, it is whether, viewed objectively, the testimony directly or circumstantially had a reasonable and natural tendency to do so. Commonwealth v. Borans, 379 Mass. 117, 136 (1979); Commonwealth v. White, 70 Mass.App.Ct. at 76. Jenkins's false statement that she did not communicate with Wallace following Lloyd's death was relevant to the investigation into Hernandez's and Wallace's involvement in the murder and had a reasonable tendency to influence the grand jury

*4 To secure a conviction for perjury with the direct testimony of a live witness, the Commonwealth must offer clear or compelling corroborating evidence; without direct evidence, the Commonwealth must offer clear and compelling circumstantial evidence of perjury objectively inconsistent with the defendant's innocence. *Commonwealth v. Silva*, 401 Mass. 318, 323–324 (1987). Clear and compelling corroborating evidence of perjury may be circumstantial and may include inferences. *Commonwealth v. Knowlton*, 50 Mass.App.Ct. 266, 270 (2000). Assuming that a heightened evidence standard applies in the context of a *McCarthy* motion, ¹ that standard was met with respect to Jenkins's response about whether she was in communication with Wallace. See **Commonwealth** *

investigation.

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internal contradictions and strong implausibilities of witness's testimony, along with readily inferred motive to lie to cover up boyfriend's role in a crime, furnished sufficient corroboration for perjury charge). Accordingly, the Grand Jury heard probable cause to arrest Jenkins for the crime of perjury.

Jenkins asks this Court to dismiss the indictment based on

impairment of the integrity of the grand jury. The Supreme

Grand Jury Impairment

Judicial Court has stated: "It is unlikely that we could devise a satisfactory, comprehensive statement of what conduct does, and what conduct does not, impair the integrity of the grand jury process." Commonwealth v. Mayfield, 398 Mass. 615, 620 (1986). ² Jenkins contends that the Commonwealth deliberately impaired the integrity of the grand jury by attempting to entrap her on perjury charges through questioning intended to create inconsistencies and by not always trying to refresh her recollection with documents in its possession. See United States v. McKenna, 327 F.3d 830, 837 (9th Cir.), cert. den., 540 U.S. 941 (2003) (noting that some jurisdictions hold that the government violates due process when it calls a witness before a grand jury with the primary purpose of obtaining testimony in order to prosecute her later for perjury on matters not material to a legitimate ongoing investigation). Even assuming that the Supreme Judicial Court would recognize the perjury trap doctrine as a basis to dismiss an indictment, Jenkins has failed to establish that the prosecutor questioned her for the primary purpose of securing a perjury indictment or that the perjury charged involves matters not germane to the legitimate investigation into Lloyd's death. Cf. Commonwealth v. Borans, 379 Mass. at 139 (rejecting as specious the argument that defendant was trapped into perjury, where prosecutor's questions were aimed at flushing out the truth).

Jenkins also contends that the prosecutor's failure to instruct the Grand Jury on the elements of perjury impaired the grand jury proceedings. The general rule is that the Commonwealth "is not required to inform a grand jury of the elements of the offense for which it seeks an indictment or of any lesser included offenses." Commonwealth v. Noble. 429 Mass. 44, 48 (1999). See also Commonwealth v. Riley, 73 Mass. App. Ct. 721, 727, rev. den., 453 Mass. 1111 (2009). The Supreme Judicial Court has established only two exceptions to this rule. Commonwealth v. Rex. 469 Mass. 36, 41 n. 10 (2014). First, if the Commonwealth seeks to indict a juvenile for murder and there is substantial evidence of mitigating circumstances or defenses, other than lack of criminal responsibility, presented to the grand jury, the prosecutor must instruct the grand jury on the elements of murder and on the significance of the mitigating circumstances and defenses. Commonwealth v. Walczak, 463 Mass. 808, 810 (2012). Second, where the grand jurors ask for instructions, the prosecutor should provide the appropriate information. Commonwealth v. Noble, 429 Mass. at 48. Neither exception applies to this case. Accordingly, Jenkins has not established that the integrity of the grand jury proceeding was impaired so as to require dismissal of the indictment.

ORDER

*5 For the foregoing reasons, it is hereby *ORDERED* that the Motion to Dismiss For Insufficient Evidence and for Impairing the Integrity of the Grand Jury be *DENIED*.

All Citations

Not Reported in N.E.3d, 2014 WL 6646473

Footnotes

- 1 See Commonwealth v. Brown, 55 Mass.App.Ct. 440, 447 (2002).
- The most common scenario is that of a defendant who proves that the Commonwealth knowingly or recklessly presented false or deceptive evidence for the purpose of obtaining an indictment and that the evidence

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Com. v. Jenkins, Not Reported in N.E.3d (2014)

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probably influenced the grand jury's decision to indict. See Commonwealth v. Carr, 464 Mass. 855, 866–867 (2013); Commonwealth v. Hunt, 84 Mass. App. Ct. 643, 651 (2013), rev. den., 467 Mass. 1104 (2014).

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73 Mass.App.Ct. 1119 Unpublished Disposition NOTICE: THIS IS AN UNPUBLISHED OPINION. Appeals Court of Massachusetts.

COMMONWEALTH
v.
Sergey KULIKOV.

No. 08–P–261.

By the Court (KAFKER, GRAHAM & WOLOHOJIAN, JJ.).

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

*1 The defendant appeals from his convictions of breaking and entering in the daytime under G.L. c. 266, § 18, and failure to register as a sex offender under G.L. c. 6, § 178H. With respect to the breaking and entering conviction, he claims that it was error to amend the indictment to change "dwelling house" to "building." As to the registration conviction, he argues that the indictment did not put him on sufficient notice of the manner in which he was alleged to have violated the statute. We affirm.

1. Amendment of indictment charging breaking and entering in the daytime. On the day trial was scheduled to begin, but before the case was called for trial, the Commonwealth moved to amend the indictment charging violation of G.L. c. 266, § 18. The indictment, which was captioned "Indictment Breaking and Entering in the Daytime," charged the defendant with breaking and entering "in the daytime the dwelling house of James Dusza." The defendant had been apprehended in Dusza's office, not his house.

A crime must be proved as charged and charged as proved; however, amendments may be made if they are of a matter of form rather than of substance, and if not prejudicial to the defendant. See Mass.R.Crim.P. 4(d), 378 Mass. 849 (1979) (a "judge may allow amendment of the form of a complaint or indictment if such amendment would not prejudice the defendant or the Commonwealth"). Matters of form are those "not essential to the description of the crime

charged." Commonwealth v. Snow, 269 Mass. 598, 606 (1930). See Commonwealth v. Grasso, 375 Mass. 138, 139 (1978) (no fatal variance where complaint described weapon as firearm where it was not under statute, but was later adequately described). "One test for determining whether an amendment is a matter of form or one of substance is whether a conviction on the original indictment would bar the subsequent prosecution of the defendant based on the amended indictment." Commonwealth v. Knight, 437 Mass. 487, 492–493 (2002). See Commonwealth v. Snow, supra at 609–610 (where conviction on indictment as drawn would not bar an indictment as amended, amendment is of substance and not form).

The amendment here was one of form, rather than substance. The indictment charged violation of G.L. c. 266, § 18, by breaking and entering in the daytime. Where the act is alleged to have occurred during the day time (as it was in this case), the statute criminalizes breaking and entering a "building, ship or motor vehicle or vessel." Ibid., as amended by St.1989, c. 490. A dwelling house is a type of building. See Commonwealth v. Swahn, 5 Mass.App.Ct. 642, 645-646 (1977) (jury were correctly instructed that dwelling house is a building); Commonwealth v. Jackson, 37 Mass.App.Ct. 940, 941 (1994) (the term building includes a dwelling house for purposes of G.L. c. 265, § 21). Therefore, when the defendant was charged with breaking and entering a dwelling house, he was necessarily informed that he was being charged with breaking and entering a type of building, and the amendment was thus one of form rather than substance.

*2 Any possibility of confusion or prejudice was minimized, if not eliminated, by the fact that the same grand jury, on the same day, also charged the defendant with committing a larceny in a "building" on the same date, in the same town, and of the same victim. To the extent that the defendant now claims that he did not understand or was confused that he was being charged with breaking and entering a "building" because one of the two indictments used the term "dwelling house," reference to the second indictment would have alleviated any such misapprehension.

Finally, the defendant argues that he was prejudiced by the trial judge allowing the Commonwealth's motion to amend the indictment so as to correct the error of identifying Dusza's office as his dwelling. In the circumstances of this case, it was not prejudicial to be deprived of the opportunity to take advantage of an error in the indictment. See *Commonwealth*

Com. v. Kulikov, 73 Mass.App.Ct. 1119 (2009)

900 N.E.2d 912

v. Saylor, 27 Mass.App.Ct. 117, 119 (1989) (amendment not prejudicial where defendant's only argument to that effect is that the Commonwealth lacked the evidence to prove the indictment in its unamended form).

2. Indictment for sex offender registration violation. The defendant argues that he was exposed to double jeopardy because the indictment did not identify the means by which he was alleged to have violated the registration requirements of

G.L. c. 6, § 178H, which provides four different means of violation. If for no other reason, this argument fails because it is not supported by the record. The indictment unambiguously stated that the defendant had failed "to register or verify registration information with the sex offender registry," two of the four ways the statute can be violated. The fact that two means of committing the crime were charged disjunctively (i.e., by using "or") is not fatal. Moreover, because both the statute and the indictment alleged acts in the disjunctive, the Commonwealth could prove the crime by showing

performance of any one of the acts. See Commonwealth v. Murphy, 415 Mass. 161, 164 (1993).

Finally, we are not persuaded by the defendant's claims of confusion and prejudice. He failed to request a bill of particulars. See *Commonwealth v. Valleca*, 358 Mass. 242, 244 (1970) (indictment not void for confusion where defendant did not request a bill of particulars); G.L. c. 277, § 34 (same). And, apart from the bare assertion, he has not articulated—let alone shown—any prejudice.

For these reasons, the judgments are affirmed.

So ordered.

All Citations

73 Mass.App.Ct. 1119, 900 N.E.2d 912 (Table), 2009 WL 259137

Footnotes

Under art. 12 of the Declaration of Rights of the Massachusetts Constitution, amendments can not "materially change[] the work of the grand jury," *Commonwealth v. Benjamin*, 358 Mass. 672, 679 (1971), because "no one may be convicted of a crime punishable by a term in the State prison without first being indicted for that crime by a grand jury." Commonwealth v. Knight, 437 Mass. 487, 492 (2002), quoting from Commonwealth v. Barbosa, 421 Mass. 547, 549 (1995).

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81 Mass.App.Ct. 1128 Unpublished Disposition NOTICE: THIS IS AN UNPUBLISHED OPINION. Appeals Court of Massachusetts.

COMMONWEALTH v. Victor QUADROS.

No. 11–P–1295. l
April 10, 2012.

By the Court (CYPHER, SMITH & FECTEAU, JJ.).

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

*1 On appeal from his convictions, the defendant argues error in the denial of his motion to dismiss; he claims his convictions for indecent assault and battery (two counts) and assault and battery (two counts) were erroneously based upon conduct for which he was not indicted by the grand jury in violation of art. 12 of the Massachusetts Declaration of Rights. ¹ We affirm.

The defendant's reliance upon Commonwealth v. Barbosa, 421 Mass. 547 (1995), is misplaced. Moreover, Barbosa is distinguished from the instant case on its facts. In Barbosa, there was evidence of two separate drug transactions occurring on the same day with different purchasers, but only one distribution indictment. Id. at 550. Here, the defendant was involved in a single criminal episode against a single victim that involved two definable segments, separated by an unsuccessful attempt by the victim to escape, each segment including easily distinguishable acts of simple and indecent battery. 2 We discern no risk that the defendant was convicted of an offense for which he was not indicted. The fact that the evidence might have supported more indictments than were returned does not mean that he was exposed, as was the defendant in Barbosa, to conviction for conduct that might not have been the basis for indictment. 3 Rather, in each of the two segments, the defendant touched the victim indecently on several parts of her body but all were but a part of a single course of conduct. See Commonwealth v. Keevan, 400 Mass. 557, 565-566 (1987), and Commonwealth v. Crowder, 49 Mass. App. Ct. 720, 721–722 (2000). Thus, the defendant's motion to dismiss was properly denied.

Judgments affirmed.

All Citations

81 Mass.App.Ct. 1128, 965 N.E.2d 225 (Table), 2012 WL 1172186

Footnotes

- 1 The defendant was also charged with one count of assault with intent to rape for which he was acquitted.
- Even if the issue was properly before us, the convictions for assault and battery were not duplicative as lesser included offenses of indecent assault and battery. The judge made clear in his instructions, in accordance with the evidence, that the conduct the jury may consider were separate and apart from any form of contact that could involve indecent touching, e.g., the victim being grabbed from behind and being thrown to the floor.
- 3 Moreover, as to each indictment, the judge gave specific unanimity instructions.

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74 Mass.App.Ct. 1113 Unpublished Disposition NOTICE: THIS IS AN UNPUBLISHED OPINION. Appeals Court of Massachusetts.

COMMONWEALTH
v.
William RAVELLETTE.

No. 07–P–1213.

May 26, 2009.

West KeySummary

Criminal Law ← Sex offenses; obscenity
 Sex Offenses ← Continuing or repeated conduct

A single charge of rape was proper where the alleged multiple acts of penetration were part of a continuing criminal episode. The defendant had sexual contact with his minor half-sister two times in two locations over the course of a day. The defendant argued that the grand jury heard evidence of only a single incident of natural intercourse occurring at the second location, while at trial the victim testified to two incidents of natural intercourse, one at her house and one at the house of her other brother. However, the description of the sexual abuse portrayed a continuing episode of abuse over the course of a day, and thus there was no risk that the defendant was convicted of a crime for which he was not indicted.

By the Court (GRASSO, SMITH & TRAINOR, JJ).

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

*1 The defendant, William Ravellette, was convicted by a Superior Court jury of two counts of rape of a child, natural

and oral, in violation of G.L. c. 265, § 23. The defendant was found not guilty of a third count charging digital rape. An eleven year-old girl was the complainant in all of the indictments.

The defendant filed a timely appeal, which was stayed in order to allow him to file a motion for a new trial. In his new trial motion, the defendant claimed, among other things, that: (1) his conviction was based upon evidence not before the grand jury; (2) the judge improperly failed to give a specific unanimity instruction; and (3) his trial counsel was ineffective for failing to adequately cross-examine the complainant and the first complaint witness. The trial judge denied the motion in a memorandum of decision. ¹ The direct appeal and the appeal from the denial of the motion for a new trial were consolidated in this court. We affirm the denial of the defendant's motion for a new trial and affirm the judgment.

1. Facts. We recite the facts that the jury could have found. During the relevant time period, the eleven year old victim was living with her parents, her sister, and her half-brother, the defendant. One day, at some point between October 14, 1998, and October 13, 1999, while they were at home, the defendant approached the victim and offered her money if she would have sex with him. At that time, the defendant was approximately twenty-one years old. They went to her parents' room, where the defendant penetrated the victim with his penis and his tongue. They stopped when they heard the victim's uncles entering the house.

Later that same day, the defendant telephoned the victim and offered to let her drive his car if she would have sex with him. She was excited at the thought of driving a car. The defendant then drove the victim to her other brother's house, where the defendant again penetrated her vagina with his tongue and his penis. After approximately forty-five minutes, they left the other brother's house. The victim briefly drove the car, the defendant gave her twenty dollars and drove her home. Later in the day, the victim told her sister what had happened. The incidents were not reported to police until 2005. Further facts will be set forth as necessary.

2. Standard of review. We review a judge's decision denying a motion for a new trial pursuant to Mass.R.Crim.P. 30(b), as appearing in 435 Mass. 1501 (2001), "only to determine whether there has been a significant error of law or other abuse of discretion." Commonwealth v. Grace, 397 Mass. 303, 307, 491 N.E.2d 246 (1986). "A motion for a new

trial 'is addressed to the sound discretion of the trial judge, and ... will not be reversed unless it is manifestly unjust, or unless the trial was infected with prejudicial constitutional error." "Commonwealth v. Tennison, 440 Mass. 553, 566, 800 N.E.2d 285 (2003), quoting from Commonwealth v. Russin, 420 Mass. 309, 318, 649 N.E.2d 750 (1995). "Reversal for abuse of discretion is particularly rare where the judge acting on the motion was also the trial judge." Commonwealth v. Lucien, 440 Mass. 658, 670, 801 N.E.2d 247 (2004) (citation omitted).

*2 3. Scope of the indictment for natural intercourse. The grand jury heard the testimony of the sister, the other brother, and Margaret Leavitt, an interviewer who had conducted a SAIN² interview with the victim. A videotape of the SAIN interview also was entered in evidence before the grand jury.

Leavitt testified about the victim's responses in the SAIN interview. She described the victim's interview about the encounter with the defendant at the victim's house, specifically detailing the oral sex that had occurred in the parents' bedroom. Leavitt did not, however, testify that the victim told her that any natural intercourse had occurred at the victim's parents' home. Leavitt further testified that the victim told her that later, at the other brother's house, the defendant touched the victim's vagina with his tongue, penis, and fingers. In her SAIN interview, the victim described having "sex" at her house with the defendant, and further detailed the oral sex she had with the defendant in her parents' bedroom. She then described the incidents at her other brother's house. The sister and the other brother both offered testimony about the victim and the defendant's admissions to having a sexual relationship with each other. The grand jury returned a single indictment charging rape by natural intercourse, [2006–413– 003; RA 3] and two indictments charging rape by unnatural intercourse, digital and oral. [2006–413–001; 2006–413–002; RA 1-2]

The defendant maintains that the grand jury heard evidence of only a single incident of natural intercourse occurring at the other brother's house; it is undisputed that at trial, the victim testified to two incidents of natural intercourse, one at her house and one at the house of her other brother. On the basis of his interpretation of the evidence before the grand jury, the defendant argues that he may have been convicted of a crime for which he was not indicted, in violation of art. 12 of the Declaration of Rights of the Massachusetts Constitution.

See Commonwealth v. Barbosa, 421 Mass. 547, 549–554, 658 N.E.2d 966 (1995). The Commonwealth counters that

evidence of both incidents of natural intercourse was before the grand jury, and that separate indictments were not required because the evidence showed that the defendant had engaged in a single continuing criminal episode. See *Commonwealth v. Crowder*, 49 Mass.App.Ct. 720, 721–722, 732 N.E.2d 349 (2000).

Our review of the SAIN interview demonstrates that the sex at her parent's home that the victim related in that interview was only the oral sex. We conclude, however, that the evidence before the grand jury was indicative of a continuing criminal episode, and that any slight discrepancy between the evidence before the grand jury and the petit jury was immaterial. First, "[t]here need not be an exact match of evidence between the evidence presented to the grand jury and the evidence presented at trial." Commonwealth v. Berry, 63 Mass. App. Ct. 910, 912, 827 N.E.2d 1278 (2005), citing Commonwealth v. Daughtry, 417 Mass. 136, 142 n. 4, 627 N.E.2d 928 (1994). Although the victim did not detail a natural intercourse act in the parents' bedroom in her SAIN interview, as she did at trial, she stated in the interview that she had "sex" with the defendant in her parent's bedroom. The difference in detail between the victim's statement in the interview and her testimony at trial is irrelevant.

- *3 Further, the Commonwealth was not required to file separate indictments for each incident of abuse to preserve the defendant's art. 12 rights. "[T]he Commonwealth is generally free to bring indictments in as many counts as it feels appropriate in the circumstances." Commonwealth v. Gurney, 13 Mass.App.Ct. 391, 399 n. 9, 433 N.E.2d 471 (1982). In light of that discretion, "it is well established that a single indictment for rape is proper where the alleged multiple acts of penetration are part of a continuing criminal episode." Commonwealth v. Crowder at 721-722, 732 N.E.2d 349, citing Commonwealth v. Keevan, 400 Mass. 557, 565–566, 511 N.E.2d 534 (1987). Here, the victim's description of the sexual abuse on the SAIN interview videotape, in addition to Leavitt's testimony about the contents of the interview, portrayed a continuing episode of various sexual abuses over the course of a day. On the record before us, there is no risk that the defendant was convicted of a crime for which he was not indicted.
- 4. Specific unanimity instruction. The defendant next argues that the judge's failure to give a specific unanimity instruction on the indictment alleging natural intercourse was prejudicial error. As the defendant did not object to the jury instructions,

we consider whether the error, if any, in the instructions gave rise to a substantial risk of a miscarriage of justice. See *Commonwealth v. Federico*, 70 Mass.App.Ct. 711, 719, 876 N.E.2d 479 (2007).

"A general unanimity instruction informs the jury that the

verdict must be unanimous, whereas a specific unanimity instruction indicates to the jury that they must be unanimous as to which specific act constitutes the offense charged." Commonwealth v. Keevan, supra at 566–567, 511 N.E.2d 534. Generally speaking, a specific unanimity instruction is appropriate where there is "evidence of alternate incidents that could support the charge against the defendant." Commonwealth v. Kirkpatrick, 423 Mass. 436, 442, 668 N.E.2d 790, cert. denied, 519 U.S. 1015, 117, 117 S.Ct. 527, —, 136 L.Ed.2d 413, —— (1996). A specific unanimity instruction is required if properly requested and if warranted by the evidence. See Commonwealth v. Federico, supra at 719, 876 N.E.2d 479. Compare Commonwealth v. Conefrey, 420 Mass. 508, 514-516, 650 N.E.2d 1268 (1995). "It is, however, well established that a judge's failure to give a specific unanimity instruction sua sponte does not automatically give rise to a substantial risk of a miscarriage of justice where, as here, the Commonwealth presented evidence sufficient to withstand a motion for a required finding of not guilty on each of the charged offenses." Commonwealth v. Federico, supra at 719–720, 876 N.E.2d 479.

The evidence presented by the Commonwealth was sufficient to warrant a jury in finding beyond a reasonable doubt that the defendant, on two separate occasions, engaged in natural intercourse with the victim. The victim's testimony clearly described the defendant's conduct during each incident. Her credibility was the critical issue at trial, and, as established by the verdicts, it was accepted by the jury. See **Commonwealth v. Kirkpatrick, supra* at 442, 668 N.E.2d

Commonwealth v. Kirkpatrick, supra at 442, 668 N.E.2d 790. The jury's careful consideration of the testimony is supported by their returning two guilty and one not guilty verdicts. Further, "no risk of a miscarriage of justice will be found if the several acts of rape (i.e., the multiple penetrations) transpire in the context of a single criminal

episode," as is the case here. Commonwealth v. Black, 50 Mass.App.Ct. 477, 478, 738 N.E.2d 751 (2000). The jury were also instructed that their verdict had to be unanimous as to each of the two counts. Based on these facts as established on the record before us, we conclude that any error in the judge's instructions to the jury fell short of giving rise to a substantial risk of a miscarriage of justice. See Commonwealth v. Comtois, 399 Mass. 668, 676–677, 506 N.E.2d 503 (1987).

*4 5. Ineffective assistance of counsel. The defendant asserts that his counsel failed to effectively impeach both the victim, and the first complaint witness, her sister, regarding prior inconsistent statements. ³ His contention that this constituted ineffective assistance of counsel is without merit.

Generally, the mere failure to impeach a witness does not prejudice the defendant or constitute ineffective assistance. Commonwealth v. Ortiz, 53 Mass.App.Ct. 168, 180, 757 N.E.2d 1113 (2001), citing Commonwealth v. Fisher, 433 Mass. 340, 357, 742 N.E.2d 61 (2001). Furthermore, the decision to impeach a witness is a strategic consideration which is viewed with deference, and unless counsel failed to "pursue some obviously powerful form of impeachment ... it is speculative to conclude that a different approach ... would likely have affected the jury's conclusion. [Ibid.]" Commonwealth v. Knight, 437 Mass. 487, 502, 773 N.E.2d 390 (2002). The record reveals that defense counsel vigorously cross-examined and impeached the victim and the first complaint witness with their prior inconsistent statements. 4 That defense counsel did not pursue additional, or more rigorous, avenues of impeachment does not constitute ineffective assistance. Commonwealth v. Fisher, supra at 357, 742 N.E.2d 61, citing Commonwealth v. Mitchell, 428 Mass. 852, 854-856, 705 N.E.2d 263 (1999).

Judgments affirmed.

All Citations

74 Mass.App.Ct. 1113, 906 N.E.2d 369 (Table), 2009 WL 1442014

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Com. v. Ravellette, 74 Mass.App.Ct. 1113 (2009)

906 N.E.2d 369

Footnotes

- An evidentiary hearing was held that was limited to an ineffective assistance of counsel claim that is not before us.
- 2 Sexual Abuse Intervention Network.
- The defendant asserts that his defense counsel should have impeached the victim with her SAIN interview statement, as testified to before the grand jury by Leavitt, that "I can't positively say that I honestly remember him doing it," and the sister with her statement before the grand jury that "He wanted her to have sex with him but she wouldn't."
- In fact, as noted by the trial judge, "[d]uring cross-examination, ... trial counsel read into the record [the contested] portion of [the sister's] grand jury testimony which [the sister] admitted was her testimony."

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88 Mass.App.Ct. 1105 Unpublished Disposition NOTICE: THIS IS AN UNPUBLISHED OPINION. Appeals Court of Massachusetts.

COMMONWEALTH

v

Godwin STRAKER.

No. 13–P–927. | | September 18, 2015.

Synopsis

Background: Defendant was convicted in the trial court of assault and battery and rape, and he appealed.

[Holding:] The Appeals Court held that indictment was not defective since indictment charged the defendant with rape by force of the victim in a certain city on or about certain date.

Affirmed.

West Headnotes (2)

[1] Criminal Law Grounds of review in general

Criminal Law 🌦 Amendment and Correction

Burden was on the defendant as the appellant to furnish a sufficient record to support his arguments on appeal, which included an obligation to reconstruct any missing parts of the record. Rules App.Proc., Rule 8(c), 43C M.G.L.A.

[2] Sex Offenses \leftarrow Rape

Indictment, charging the defendant with rape by force of the victim in a certain city on or about certain date, was not defective; nothing more was required to enable the defendant to understand the charge or to permit him to defend against it, and to the extent that he wanted to know further details, it fell to him to request a bill of particulars. M.G.L.A. c. 277, § 34; M.G.L.A. c. 265, § 22(b).

By the Court (MEADE, WOLOHOJIAN & MILKEY, JJ. *).

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

*1 The defendant challenges his convictions, after a jury trial, of assault and battery and rape. In essence, he argues that because the grand jury heard evidence of two rapes and two assaults and batteries, but returned only a single indictment for each crime, it is not possible to know whether he was convicted of the crime the grand jury intended to indict. We affirm.

We summarize the evidence before the grand jury. In July 2011, the victim was a student at Bridgewater State University as part of a program for teenagers with mental health issues. Her roommate introduced her to the defendant, with whom she began corresponding electronically. On their first "date," the defendant had sexual intercourse with her while she was passed out from drinking alcohol supplied by the defendant. The victim became aware of this when she came to while he was having intercourse with her. This rape happened in Brockton, at an apartment to which the victim had been taken. For the next month, the defendant kept control over the victim, erasing the contacts in her cellular telephone (cell phone), not allowing her to return to the university campus, training her in the details of how to offer sex for hire, watching her while she engaged in that trade, requiring her to give him all her earnings, having her call him "Daddy" and refer to herself as his "bottom bitch," and using her to recruit another woman to work for him. At some point in August 2011, about one month after she first met the defendant, he became enraged when the victim answered a cell phone call from a friend asking about her well-being and seeking to see her. At the time, the victim and the defendant were in a motor vehicle en route to Rhode Island. The defendant grabbed the cell phone from her and threw it out the vehicle window. He stepped on the victim's hand when she tried to retrieve the cell phone. When the victim tried to scream for help, the defendant pulled her by the hair and "smashed" her head against the vehicle window. He then threw her to the seat and

sat on her head. The defendant subsequently took the victim to the Elm Court hotel in Brockton, where he raped her. The following day, he took the victim to his cousin's house (also in Brockton) where another confrontation occurred and the defendant hit the victim over the head with an office chair, punched her in the face, and broke her nose, causing her to lose consciousness. The victim then escaped, was helped by passersby, and ultimately reunited with her mother.

On this evidence, the grand jury returned a single indictment for rape, G.L. c. 265, § 22(b), a single indictment for assault and battery, G.L. c. 265, § 13A, an indictment for assault and battery by means of a dangerous weapon (chair), G.L. c. 265, § 15A(b), and procuring a person to practice prostitution, G.L. c. 272, § 12. The rape indictment charged the defendant with having committed a rape "on or about August, 2011 at Brockton." The assault and battery indictment alleged the same with respect to that crime. The defendant was convicted on all counts. ¹ He raises no issue concerning the conviction of assault and battery by means of a dangerous weapon (chair), or the conviction of procuring a person to practice prostitution.

*2 The defendant acknowledges that the case was tried and submitted to the jury on the Elm Court hotel rape and the punch that caused the broken nose. The judge informed the jury that the rape charge was based on the Elm Court hotel rape, and the prosecutor and defense counsel tried and argued the case on that basis. They also tried and argued the assault and battery charge on the basis of the punch that broke the victim's nose. The defendant does not contend that there is any uncertainty about the events upon which the *convictions* rested.

Instead, the defendant argues that there is uncertainty about the events upon which the *indictments* rested. It is true, as the defendant asserts, that the grand jury heard evidence of two rapes that occurred in Brockton during August 2011. ², ³ It does not follow, however, that the indictment is "ambiguous" as the defendant claims, or that they are otherwise defective, or that he had no obligation to seek a bill of particulars, or that he has not waived any objection.

At the outset, the defendant's arguments have been waived. "In a criminal case, any defense or objection based upon defects in the institution of the prosecution or in the complaint or indictment, other than a failure to show jurisdiction in the court or to charge an offense, [4] shall only be raised prior to

trial and only by a motion in conformity with the requirements of the Massachusetts Rules of Criminal Procedure." G.L. c. 277, § 47A, as amended through St.1979, c. 344, § 39. *Commonwealth v. Lamont* L., 438 Mass. 842, 844, 784 N.E.2d 1119 (2003). Here, no such motion was made at any point; the issues are raised for the first time on appeal.

There is another threshold deficiency to the defendant's [1] arguments, which depend on having a complete record of the grand jury proceedings. ⁵ The grand jury transcript contains the testimony of the victim and of two police officers. It ends at the conclusion of the second officer's testimony, without any indication (a) whether additional witnesses were presented to the grand jury, (b) whether any further information was presented to the grand jury, or (c) what the prosecutor said to the grand jury when she requested that they return the indictments. Thus, the assumption that underlies all of the defendant's arguments (namely, that the grand jury were asked, or intended, to indict the first rape) cannot be verified by the record on appeal. At best, the record shows that evidence of two rapes was presented to the grand jury. It does not necessarily follow, in the absence of a fuller record, that the grand jury's single rape indictment was intended to encompass the first rape as well as the second one. The burden was on the defendant as the appellant to furnish a sufficient record to support his arguments on appeal, see,

e.g., Commonwealth v. Woods, 419 Mass. 366, 371–372, 645 N.E.2d 1153 (1995), which includes an obligation to reconstruct any missing parts of the record in accordance with Mass.R.A.P. 8(c), as amended, 378 Mass. 932 (1979).

*3 Even were we to overlook these threshold [2] deficiencies in the defendant's arguments, he would fare no better. The rape indictment was not defective as that term has been defined by the Legislature. "An indictment shall not be ... considered defective or insufficient if it is sufficient to enable the defendant to understand the charge and to prepare his defense; nor shall it be considered defective or insufficient for lack of any description or information which might be obtained by requiring a bill of particulars." G.L. c. 277, § 34, as appearing in St.1979, c. 344, § 34. Here, the indictment charged the defendant (by name) with rape by force, in violation of G.L. c. 265, § 22(b), of the victim (who was identified by her initials), in Brockton on or about August 2011. 6 Nothing more was required to enable the defendant to understand the charge or to permit him to defend against it. To the extent that he wanted to know further details (such as whether the charged rape occurred at the Elm Court hotel or

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at the defendant's cousin's house), it fell to him to request a bill of particulars. See Mass.R.Crim.P. 13(b)(1), as appearing in 442 Mass. 1516 (2004) (granting trial judge discretion, sua sponte or on defendant's motion, to order that prosecution file bill of particulars "as may be necessary to give both the defendant and the court reasonable notice of the crime charged"). ⁷

This case is closer to *Commonwealth v. Crowder*, 49 Mass.App.Ct. 720, 721–722, 732 N.E.2d 349 (2000), where we concluded that there was no risk that the defendant was convicted of a crime for which he was not indicted,

than it is to *Commonwealth v. Barbosa*, 421 Mass. 547, 550–551, 658 N.E.2d 966 (1995), where the Supreme Judicial Court concluded such a risk existed. Here, the issue was waived; in *Barbosa* the issue was timely preserved. As in *Crowder, supra*, the sexual offenses in this case

involved a single victim, and occurred as part of an ongoing criminal episode (albeit lasting several weeks). By contrast,

Barbosa, supra at 548–549, 658 N.E.2d 966, involved different victims and separate transactions. Perhaps most importantly, in Barbosa, supra at 552, 658 N.E.2d 966, the Commonwealth proceeded on both transactions at trial; here, the Commonwealth at all times (even pretrial) proceeded only on the Elm Court hotel rape.

For the reasons set out above, the convictions are affirmed.

Judgments affirmed.

All Citations

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Footnotes

- * The panelists are listed in order of seniority.
- The defendant was acquitted of an additional charge of procuring a person to practice prostitution that related to a different woman.
- 2 The testimony at trial placed the first rape in July, not August.
- The same cannot be said of the assault and battery indictment. There was no evidence before the grand jury that the assault and battery in the motor vehicle took place in Brockton. By contrast, the victim's testimony established that the punch in the nose took place at "Jimmy's" house, which was located in Brockton. On this record, combined with the fact that the indictment specifies that the crime occurred in Brockton, the defendant has failed to establish any meaningful possibility that the grand jury intended to indict him for the assault and battery in the vehicle.
- 4 On its face, the indictment fell within the jurisdiction of the Superior Court.
- We allow the defendant's motion to expand the appellate record to include the transcript of the grand jury testimony.
- The time and place of the crime did not need to be alleged because they are not essential elements of the crime of rape. See G.L. c. 277, § 20. Thus, the indictment gave the defendant more than what he was strictly entitled to. Moreover, it should be noted that at trial the victim placed the first rape in July, soon after she first met the defendant. Thus, at least by that point, there is little likelihood that the defendant would not have understood that the indictment rested on the second rape.
- It is perhaps not surprising that the defendant did not seek a bill of particulars because the Commonwealth at all times, including in its pretrial filings, made clear that the charge related to the Elm Court hotel rape.

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389 Fed.Appx. 194

This case was not selected for publication in West's Federal Reporter.

See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of Appeals 3rd Cir. App. I, IOP 5.1, 5.3, and 5.7.

United States Court of Appeals,

Third Circuit.

UNITED STATES of America v. Gerardo FERNANDEZ, Appellant.

No. 09–3917.

Filed July 21, 2010.

Synopsis

Background: Defendant was convicted by jury of one count of perjury, acquitted of one count of obstruction of justice, and was sentenced to 18 months in prison, by the United States District Court for the District of New Jersey, Anne E. Thompson, J. Defendant appealed.

Holdings: The Court of Appeals, Hardiman, Circuit Judge, held that:

- [1] prosecutor's questions before grand jury were not fundamentally ambiguous;
- [2] indictment was not duplicitous;
- [3] audiotapes of telephone calls were inadmissible;
- [4] audiotapes and transcripts of city council meetings were inadmissible;
- [5] jury instruction correctly charged elements of perjury and burden of proof; and
- [6] two-level obstruction of justice sentence enhancement was warranted.

Affirmed.

West Headnotes (11)

[1] **Perjury** • Falsity of testimony or assertion, and knowledge thereof

Although prosecutor's fact questions could have been more specific, as posed to defendant appearing as witness before grand jury investigating bribery scheme, prosecutor's questions were not fundamentally ambiguous, as would render invalid defendant's indictment for perjury based on allegedly false statements made to grand jury, since it was clear from context of prosecutor's questions and record as whole that defendant understood what prosecutor was asking, and defendant never indicated that he was confused by any questions to which he allegedly responded falsely and unequivocally. 18 U.S.C.A. § 1623(a).

4 Cases that cite this headnote

[2] Indictments and Charging Instruments Obstructing justice, bribery, and perjury

Indictment charging defendant with multiple false statements in same count of perjury, based on his testimony as witness before grand jury investigating bribery scheme, was not duplicitous, as would render indictment invalid, since indictment's specified multiple statements demonstrated same falsehood all regarding the same scheme. 18 U.S.C.A. § 1623(a).

4 Cases that cite this headnote

[3] Indictments and Charging Instruments Obstructing justice, bribery, and perjury

Any constructive amendment of indictment that may have resulted from jury instruction regarding unanimity of multiple falsehoods in indictment charging defendant with one count of perjury for allegedly false statements made to grand jury investigating bribery scheme was not impermissible, on grounds that defendant's Fifth Amendment rights were not violated, since alleged constructive amendment did not broaden possible bases for conviction from that which appeared in indictment, district court did not permit jury to consider statements beyond those in indictment, and defendant had full notice of charges and statements against which he needed to defend. U.S.C.A. Const.Amend. 5; 18 U.S.C.A. § 1623(a).

[4] Criminal Law Evidence calculated to create prejudice against or sympathy for accused

Probative value of audiotapes of telephone calls between mayor and city council members, proffered by defendant to corroborate his testimony that he had no motive to make perjurious statements to grand jury investigating bribery scheme involving mayor and council members, was substantially outweighed by danger of unfair prejudice from potential jury confusion regarding narrow issue of perjury charge by admitting evidence of scheme in which defendant had not participated. 18 U.S.C.A. § 1623(a); Fed.Rules Evid.Rule 403, 28 U.S.C.A.

[5] Criminal Law Evidence calculated to create prejudice against or sympathy for accused

Probative value of audiotapes and transcripts of prior city council meetings, proffered by defendant to corroborate his testimony that he had no motive to make perjurious statements to grand jury investigating bribery scheme involving mayor and council members, was substantially outweighed by danger of unfair prejudice from cumulative effect of repetitive uncontested information that had already been presented through testimony, and meeting minutes and agendas were permitted to be submitted as alternative. 18 U.S.C.A. § 1623(a); Fed.Rules Evid.Rule 403, 28 U.S.C.A.

[6] Privileged Communications and Confidentiality Subject Matter; Particular Cases

Government's questioning of defendant regarding what his lawyer told him about scope of grand jury investigation of bribery scheme did not violate attorney-client privilege, at defendant's trial on one count of perjury for allegedly false statements made to grand jury, since defendant repeated only what his attorney had learned from prosecutor, and such information was not privileged legal advice. 18 U.S.C.A. § 1623(a).

1 Cases that cite this headnote

[7] Obstructing Justice Offenses relating to witnesses or potential witnesses

Perjury ← Willfulness and knowledge of falsity of testimony

Instructions fairly and adequately submitted to jury definition of "knowingly," at defendant's trial for offenses of perjury and obstruction of justice based on allegedly false statements made to grand jury investigating bribery scheme, although instruction did not define term immediately following elements of perjury, since instructions defined term after setting out elements of obstruction of justice, and further charged that definition applied wherever term appeared among elements of either offense.

18 U.S.C.A. §§ 1512(c)(2), 1623(a).

1 Cases that cite this headnote

[8] **Perjury** • Willfulness and knowledge of falsity of testimony

Instruction correctly charged jury as to elements of perjury and burden of proof necessary to convict defendant, based on his allegedly false statements to grand jury investigating bribery scheme, since charge instructed jury that one did not make knowing falsehood if statement was based on mistake. 18 U.S.C.A. § 1623(a).

[9] **Perjury** \hookrightarrow Instructions

Instruction that government was not required to inform grand jury witness of extent or breadth of government's investigation correctly stated law, at defendant's trial on perjury charge for allegedly false statements made to grand jury investigating bribery scheme, and instruction did not discourage jury from considering defendant's argument about effect of lack of information on his state of mind. 18 U.S.C.A. § 1623(a).

[10] **Perjury** \hookrightarrow Instructions

Instruction that allegedly false statement to grand jury was material if statement had tendency to influence, impede, or hamper grand jury from pursuing investigation correctly stated law, at defendant's trial on charge of perjury for allegedly false statements made to grand jury investigating bribery scheme. 18 U.S.C.A. § 1001.

2 Cases that cite this headnote

[11] Perjury Sentence and Punishment Sentencing and Punishment Obstruction of justice

Defendant's statements at his trial that he had no recollection of telephone call with city council member and that he testified truthfully before grand jury were willful, material falsehoods warranting two-level obstruction of justice enhancement of his sentence upon conviction by jury of perjury, resulting in 18-month sentence after downward variance, since perjurious trial testimony constituted significant further obstruction by separate and distinct instances of lying during prosecution of his false statements to grand jury investigating bribery scheme that involved mayor and city council members, and sentencing court's less-than-ideal discussion of elements of perjury was supported by record and

verdict. 18 U.S.C.A. § 1623(a); U.S.S.G. § 3C1.1, 18 U.S.C.A.

2 Cases that cite this headnote

*196 On Appeal from the United States District Court for the District of New Jersey (D.C. No. 08–cr–00673), District Judge: Honorable Anne E. Thompson.

Attorneys and Law Firms

Norman Gross [Argued], Office of United States Attorney, Camden, NJ, George S. Leone, Samuel A. Stern, Office of United States Attorney, Newark, NJ, for Appellee.

Nicholas C. Harbist [Argued], Blank Rome, Cherry Hill, NJ, for Appellant.

Before: SLOVITER, BARRY and HARDIMAN, Circuit Judges.

OPINION OF THE COURT

HARDIMAN, Circuit Judge.

**1 Gerardo Fernandez was indicted on one count of perjury in violation of 18 U.S.C. § 1623(a) and one count of obstruction of justice in violation of 18 U.S.C. § 1512(c) (2). A jury found Fernandez guilty of the former charge and not guilty of the latter charge. On appeal, Fernandez raises several claims of error in his indictment, trial, and sentencing. We will affirm.

I.

Because we write for the parties, who are familiar with the facts and procedural history of the case, we recount only that which is essential to our decision.

In June 2006, the FBI and a federal grand jury sitting in Trenton, New Jersey began investigating public corruption in Passaic, New Jersey. As part of its investigation, the FBI incorporated a dummy insurance company, Coastal Solutions, which was used to bribe local politicians including Passaic City Councilman Jonathan Soto. Soto represented that he could steer insurance contracts from the Passaic City Council (Council) to Coastal Solutions and indicated to an FBI informant that some of the bribes had gone to two other local politicians: Mayor Samuel Rivera and Councilman Marcellus Jackson.

As part of the scheme to steer insurance business to Coastal, Soto lobbied against resolutions on the Council's March 22, 2007 agenda that would have awarded insurance *197 contracts to another company, Brown & Brown. At this time, Fernandez was also a member of the Council.

At 5:07 p.m. on March 22, two hours before the start of the meeting, Soto placed a call to Fernandez's cell phone to discuss the vote. The call was intercepted by a wiretap the FBI had placed on Soto's cell phone. During the conversation, Soto told Fernandez that: Rivera had informed Soto, Jackson and another council member, Joe Garcia, that "he doesn't want Brown & Brown to go through"; Rivera told Soto to "vote down Brown and Brown" and Soto agreed to do so; and Rivera directed Soto to "reach out to Gerry [Fernandez]." App. at 152. Soto also told Fernandez that they were going to vote against the Brown & Brown resolutions to save the City money. Id. at 153. Fernandez responded "[t]hat's right." Id. At the end of the call, Fernandez said "I'll give Sammy [Rivera] a call to let him [know] that I know what's going on." Id. at 154. Immediately after speaking with Soto, Fernandez placed a call to Rivera, which was not recorded. App. at 330-31. Both of the Brown & Brown resolutions were defeated at the March 22 meeting, with Soto, Jackson, Garcia, and Fernandez voting against them.

In September 2007, Rivera, Soto, and Jackson were arrested by federal law enforcement officials for their involvement in the bribery scheme. After the arrests, the grand jury subpoenaed Fernandez to testify on November 14, 2007. During his testimony, Fernandez denied speaking with anyone about the March 22, 2007 vote. Specifically, Fernandez testified that he had never discussed insurance matters pending before the City Council with Soto or Rivera, by telephone or otherwise. When asked whether he would recall a discussion with Soto about insurance matters, Fernandez replied: "Absolutely. I would have slapped him.... Because I don't tell anybody how to vote. I don't want anybody telling me how to vote either." App. at 25, 1015. Fernandez was subsequently indicted on one count of perjury and one count of obstruction of justice based on his grand jury testimony.

**2 At trial, Fernandez testified in his own defense. The thrust of his defense was that he did not knowingly lie to the grand jury. Fernandez averred that he had forgotten about the March 22 calls for various reasons, including that: he received numerous phone calls every day and was a busy person, the

call from Soto was not memorable because it lasted only two minutes and merely repeated information Fernandez had already learned at City Council meetings, and Fernandez had no reason to lie to the grand jury because he was not involved in the underlying bribery scheme. The jury found Fernandez guilty of perjury but not guilty of obstruction of justice.

At sentencing, the District Court applied a two-level enhancement for obstruction of justice pursuant to \$\ \bigsim \gamma\$ 3C1.1 of the United States Sentencing Guidelines (USSG or Guidelines); as a result, Fernandez faced a Guidelines range of 21 to 26 months imprisonment. The District Court varied downward and imposed a sentence of 18 months imprisonment. Fernandez filed this timely appeal, in which he raises numerous issues regarding the validity of his indictment, evidentiary rulings made by the District Court, the jury instructions, and the application of the two-point obstruction of justice enhancement. \(\bigli \)

II.

A. The Indictment

Before trial, Fernandez moved to dismiss his indictment, arguing that it was *198 impermissibly ambiguous and duplicitous. We exercise plenary review over the District Court's legal conclusions in denying the motion and review the Court's factual findings for clear error. United States v. Barbosa, 271 F.3d 438, 469 (3d Cir.2001).

[1] Fernandez claims that the questions posed to him before the grand jury could not support perjury charges because they were fundamentally ambiguous. Although a trial court has the power to dismiss a perjury count when the prosecutor's questions are fatally ambiguous, see **United States v. Serafini, 167 F.3d 812, 820 (3d Cir.1999), this is not such a case. "[T]he existence of 'some ambiguity' in a falsely answered question is generally not inconsistent with a conviction for perjury." **United States v. Camper, 384 F.3d 1073, 1076 (9th Cir.2004) (citation omitted). Rather, in instances of less than fundamental ambiguity, "it is for the petit jury to decide which construction the defendant placed on the question." **Serafini, 167 F.3d at 820 (internal quotation marks and citation omitted).

It is clear from the context of the questions and the record as a whole that Fernandez understood what the prosecutor was asking him. Though advised at the start of his grand jury appearance that "during the course of the questions and the course of this proceeding today, if you have any questions or any confusion about any questions, you'll let us know[,]" App. at 978, Fernandez never indicated that he was confused by any of the questions to which he allegedly responded falsely. Moreover, Fernandez unequivocally denied that he received any phone calls relative to the insurance resolutions prior to the vote on March 22, and in denying that he had a discussion with Soto regarding the insurance matters, Fernandez insisted that he would have remembered such a discussion. See United States v. Long, 534 F.2d 1097, 1100 (3d Cir.1976).

- **3 The fact that questions could have been more specific is not evidence of fundamental ambiguity; thus, any argument that Fernandez did not understand the questions to which he was responding was one for the jury.
- [2] Fernandez also argues that Count I of the indictment should have been dismissed as duplicitous "because the Government charged multiple false statements in the same count involving the same subject." The District Court denied Fernandez's motion to dismiss the indictment in this regard, opting to resolve any issues by charging the jury that a verdict of guilty on Count I required unanimity as to at least one perjurious statement. Fernandez contends that the unanimity instruction was inappropriate because such an instruction is proper only when a duplicity challenge is first raised at trial. Because Fernandez argued duplicity prior to trial, he claims the only appropriate remedies were election or dismissal. "Whether an indictment is duplicitous is a question of law subject to *de novo* review." *United States v. Root*, 585 F.3d 145, 150 (3d Cir.2009).

"Duplicity is the joining in a single count of two or more distinct and separate offenses." *United States v. Starks*, 515 F.2d 112, 116 (3d Cir.1975). Duplicity is not to be confused with "multiplicity," which is the charging of a single offense in several counts thereby risking multiple punishments for a single crime. 1A Charles Alan Wright & Andrew Leipold, Federal Practice and Procedure § 142 (4th ed.2010). The purposes of the prohibition against duplicitous indictments include:

- (1) avoiding the uncertainty of whether a general verdict of guilty conceals a finding of guilty as to one crime and a finding of not guilty as to another;
- *199 (2) avoiding the risk that the jurors may not have been unanimous as to any one of the crimes charged; (3) assuring the defendant adequate notice; (4) providing the basis for appropriate sentencing; and (5) protecting against double jeopardy in a subsequent prosecution.

Root, 585 F.3d at 154.

"Duplicitous pleading, however, is not presumptively invalid." United States v. Olmeda, 461 F.3d 271, 281 (2d Cir.2006). The charging of separate acts in one count is permissible "if those acts could be characterized as part of a single continuing scheme." Id. (quotation omitted). This rule makes an abundance of sense in perjury cases where the same falsehood could be repeated in several ways. In such circumstances, charging each statement separately could lead to a multiplicity challenge. See, e.g., United States v. Clarridge, 811 F.Supp. 697, 705 (D.D.C.1992) (two counts of an indictment alleging false statements before Senate Committee were multiplicatous even though they were responses to different questioners where the "statements were given pursuant to one oath, they were made before the same committee on [the same day], and they pertained to identical subject matter"). Thus, courts have held that perjury indictments are not duplicitous simply because they specify multiple statements demonstrating the same falsehood. See, e.g., United States v. Berardi, 629 F.2d 723, 729 (2d Cir.1980) ("[I]t has long been accepted practice to charge perjury before the grand jury, committed in the course of the same appearance, in a one count indictment with each false declaration set forth in a particular specification.");

- United States v. Isaacs, 493 F.2d 1124, 1155 (7th Cir.) ("In perjury cases ... where one offense is committed, all the false declarations pertaining to that offense can be charged in one count without making that count duplicitous."), cert. denied, 417 U.S. 976, 94 S.Ct. 3184, 41 L.Ed.2d 1146 (1974).
- **4 [3] Accordingly, Count I of Fernandez's indictment, which specified multiple falsehoods all regarding whether Fernandez spoke with anyone about the insurance resolutions prior to the vote, was not duplicitous. ²

B. Evidentiary Rulings

The primary focus of Fernandez's defense at trial was to disprove that he had "knowingly" lied to the grand jury. According to Fernandez, he had merely forgotten about the March 22 phone calls by the time of his grand jury testimony. On appeal, Fernandez challenges three instances in which the District Court excluded evidence offered to corroborate Fernandez's state of mind during his grand jury testimony.

*200 We review a trial court's decision to admit or exclude evidence for abuse of discretion, "and such discretion is construed especially broadly in the context of Rule 403."

*United States v. Mathis, 264 F.3d 321, 326–27 (3d Cir.2001). A district court's decision to exclude evidence under Rule 403 constitutes an abuse of discretion only where it is "arbitrary or irrational."

*United States v. Universal Rehab. Servs. (PA), Inc., 205 F.3d 657, 665 (3d Cir.2000) (en banc). If we conclude that an evidentiary ruling constituted an abuse of discretion, we must determine whether the error

was harmless. *United States v. Casoni*, 950 F.2d 893, 902 (3d Cir.1991).

1.

At trial, Fernandez sought to introduce audiotapes of telephone calls between Soto, Rivera, and Jackson which took place earlier in the day on March 22, 2007. In those calls, Soto, Rivera, and Jackson discussed whether to cut Fernandez in on the bribery scheme to secure his vote against the upcoming insurance resolutions. Ultimately, the three concluded that, instead of cutting Fernandez in, Soto would call Fernandez and tell him to vote against the resolutions to save the City money. In seeking to admit the tapes into evidence, Fernandez argued they corroborated his testimony that he had no motive to mislead the grand jury.

The District Court excluded the audiotapes, finding that they were irrelevant, and constituted impermissible hearsay. The Court noted the unreliability of the statements given the motivations of the parties to the conversation. It also found that playing the tapes would be "a distraction" because Fernandez was not accused of membership in the bribery conspiracy and his case dealt with the "very narrow" perjury issue, which the Court would not allow to be "obfuscated by

bringing in schemes and cross agendas of others." App. at 312–13.

Under Federal Rule of Evidence 403, a District Court may exclude otherwise relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed.R.Evid. 403.

[4] The audiotapes of the March 22 telephone calls between Soto, Rivera, and Jackson were largely irrelevant to the case. Fernandez was not charged with participation in the underlying bribery scheme and the Government conceded that it had no evidence he was involved. Furthermore, though the Government referred to Fernandez as a "friend" of Mayor Rivera in its opening statement, its theme throughout trial was that Fernandez was motivated to lie, not because he was a close personal friend of Rivera, but because it was politically expedient for Fernandez to curry favor with Rivera. The fact that Rivera, Soto and Jackson considered and rejected the idea of including Fernandez in their scheme does not tend to negate the Government's theory. Therefore, the tapes had minimal probative value.

**5 Moreover, the potential for "obfuscation" from the admission of evidence regarding the corruption conspiracy was high, and the District Court instructed the jurors that they could not apply guilt by association to Fernandez based on the underlying extortion crime. App. at 772. Therefore, the District Court's conclusion that the danger of confusion and prejudice from playing the audiotapes substantially outweighed their probative value was not an abuse of discretion.

***201** 2.

Fernandez next assigns error to the exclusion of audiotapes and transcripts of prior Council meetings during which the Council discussed the insurance resolutions and the need to save the City money. The District Court's statement that the tapes were irrelevant to the perjury charge was incorrect, as they did tend to show that the reason Fernandez did not recall the March 22 phone call with Soto was because it was an "unremarkable discussion" reiterating information Fernandez had already learned in the Council meetings. Contrary to the Government's assertions, Fernandez did develop this argument at trial and in his proffer of the tapes.

[5] Nonetheless, the District Court's conclusion that the tapes were repetitive of uncontested information already presented through the testimony of Gregory Hill, the City's Business Administrator, and through Fernandez's own testimony, was not improper. App. at 509–11. Fernandez proffered multiple audiotapes of full Council meetings, each twenty to forty minutes in length, and numerous pages of transcripts to corroborate undisputed testimony. See App. at 410, 523. The Court was legitimately concerned that such evidence would be a waste of time. App. at 509-511, 515. Thus, the conclusion that any probative value of the tapes was substantially outweighed by their cumulative effect was not an abuse of discretion, particularly where the Court permitted Fernandez to submit the meeting minutes and agendas as an alternative, which he did. Fed.R. Evid. 403; see App. at 499– 500 519 521 534 580-81 3

C. Jury Instructions

Fernandez asserts four errors with respect to the jury instructions. He argues that the District Court erred by: (1) failing to define the term "knowingly" with respect to the perjury count; (2) refusing to give Fernandez's proposed "ambiguity" instruction; (3) instructing the jury that a prosecutor is not obligated to give grand jury witnesses advance notice of the subject matter of the investigation; and (4) improperly instructing the jury as to "materiality." "We generally exercise plenary review in determinating 'whether the jury instructions stated the proper legal standard,' and review the refusal to give a particular instruction or the wording of instructions for abuse of discretion." *United States v. Flores*, 454 F.3d 149, 156 (3d Cir.2006) (citation omitted).

[7] Fernandez's argument with respect to the Court's knowingly charge is borderline frivolous. Though the District Court did not define the term "knowingly" immediately following its instruction concerning the elements of perjury, it did define the term after it had set out the elements of obstruction of justice, App. at 767–68, and further instructed the jury that the definition applied wherever "knowingly" appeared *202 among the elements of either offense, App. at 874. These instructions "fairly and adequately submit[ted] to the jury" the definition of knowingly for Count I. **United States v. Traitz, 871 F.2d 368, 383 (3d Cir.1989).

**6 [8] The District Court's refusal to give Fernandez's ambiguity instruction also was not an abuse of discretion because the Court charged the jury properly as to the elements of perjury and the burden of proof necessary to convict Fernandez. This included instructing the jury that one did not make a knowing falsehood if the statement was based on mistake. App. at 767. Furthermore, Fernandez's proposed instruction incorporated the issue of fundamental ambiguity which is a question for the court, not the jury.

[9] The District Court instructed the jury that "[t]he Government is under no requirement to inform a witness in the Grand Jury of the extent or breadth of the Government's investigation. Or to tell him of the evidence it already possesses or that it already has regarding the subject matter." App. at 764. This instruction neither misstated the law nor discouraged the jury from considering Fernandez's argument about the effect of the lack of information on his state of mind. Given the numerous implications made by the defense during trial that the prosecutor improperly failed to provide Fernandez with advance notice of the scope of the investigation, this instruction was not an abuse of discretion.

See, e.g., Edwards v. City of Phila., 860 F.2d 568, 575 (3d Cir.1988).

[10] Finally, Fernandez assigns error to the Court's materiality instruction because it failed to state that a material statement is one on which "a reasonable person would rely." This argument is meritless because the materiality instruction that the Court did provide—that "[a] statement is material if it has a tendency to influence, impede or hamper the Grand Jury from pursuing [its] investigation," App. at 763—was consistent with controlling precedent. See, e.g.,

United States v. Gaudin, 515 U.S. 506, 509, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995) ("[C]onviction under [18 U.S.C. § 1001 false statements] requires that the statements be 'material' to the Government inquiry ... [t]he statement must have 'a natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it is addressed." (citation omitted)).

D. Sentencing Challenge

Fernandez challenges the District Court's application of a two-level enhancement under USSG § 3C1.1 for obstruction of justice. We exercise plenary review over the

District Court's interpretation of the Guidelines, and review its findings of fact in support of an enhancement for clear error.

United States v. Wise, 515 F.3d 207, 217 (3d Cir.2008).

Fernandez's Presentence Investigation Report (PSR) found the enhancement appropriate based on his testimony at trial "that he had no recollection of the March 22, 2007 telephone call with Jonathan Soto." At sentencing, the District Court agreed that Fernandez had perjured himself at trial: "[h]aving taken that position in the Grand Jury, and feeling that he was not a wrongdoer in all of this corruption, as I view it, Mr. Fernandez could not bring himself to step away from the position he had taken." App. at 939. Because the District

Court did not further explain its application of § 3C1.1, the Government initiated the following exchange at the close of the sentencing hearing:

**7 MR. CHAO: And, Your Honor, if I just may clarify because with respect to the obstruction enhancement, did the Court find by a preponderance that defendant's *203 testimony at trial constituted false testimony?

THE COURT: Absolutely.

MR. CHAO: Concerning material matter with the willful intent to provide false testimony.

THE COURT: Yes, I believe that the defendant took the position he took early on and could not bring himself to waiver [sic] from it.

App. at 945-46.

Fernandez argues that application of the enhancement constituted improper double counting because his underlying offense was for perjury and the Government failed to show a "significant further obstruction" as required by the Application Notes to \$\frac{1}{2}\$ \square\$ 3C1.1. See USSG \square\$ 3C1.1 cmt. n. 7.

Section 3C1.1 provides for a two-level enhancement:

If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of

conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct....

the offense of conviction is perjury (among other crimes), then the enhancement should not be applied "except if a significant further obstruction occurred during the investigation, prosecution, or sentencing of the obstruction offense itself," and lists threatening a witness as an example of "significant further obstruction." USSG § 3C1.1 cmt. n. 7.

We have held that the commission of perjury at trial warrants application of the obstruction of justice enhancement.

United States v. Fiorelli, 133 F.3d 218, 221 (3d Cir.1998); see also USSG § 3C1.1 cmt. n. 4(b) (including "committing ... perjury" on "list of examples of the types of conduct to which this enhancement applies"). Moreover, we have rejected the argument that perjurious statements at trial must cause the government some additional burden in order to support a \$\ 3C1.1 enhancement. See \int Fiorelli, 133 F.3d at 223 (holding that perjury need not be "so far reaching as to impose some incremental burdens on the government" to constitute obstruction under \$3C1.1 (internal quotation marks omitted)); see also United States v. Dunnigan, 507 U.S. 87, 93, 113 S.Ct. 1111, 122 L.Ed.2d 445 (1993) (precedents requiring "some greater design to interfere with judicial proceedings ... arose in the context of interpreting early versions of the federal criminal contempt statute" convictions for crimes which did not trigger Application Note 7, they are nonetheless instructive that perjury at trial

[11] Like the Court of Appeals for the District of Columbia Circuit, "[w]e are reluctant to hold that Note 7 gives a defendant license to perjure [himself] in a criminal proceeding in order to avoid enhanced punishment for, of all things, perjury." *United States v. McCoy*, 316 F.3d 287, 289 (D.C.Cir.2003) (rejecting contention that "[s]imply repeating precisely the same statements that were the subject of perjury charges is not the sort of 'significant further obstruction' that can justify an exception to Application Note

7's general rule against applying obstruction enhancements to perjury convictions" (internal quotation marks omitted)). Thus, Fernandez's perjury at trial constitutes a "significant further obstruction" during the prosecution of his perjury before the grand jury. Contrary to Fernandez's arguments, this does not constitute "double counting." Fernandez was convicted of perjury before *204 the grand jury, and the enhancement was based on his perjury at trial. As noted in the PSR, these were "separate and distinct" instances of lying; there is no free pass for consistent perjury. Therefore, the enhancement was warranted in this case.

**8 Fernandez also assigns error to the District Court's failure to make specific findings in support of the enhancement. While it is true that the District Court's discussion of the elements of perjury was less than ideal (as evidenced by the Government's attempt to shore up the Court's findings at the end of the sentencing hearing), this is not a basis for vacating application of the enhancement where it is supported by the record and jury's verdict. As we stated in *United States v. Boggi*:

[W]e stress that it is preferable for a district court to specifically state its findings as to the elements of perjury on the record when applying this enhancement. However, where, as here, the record establishes that the district court's application of the enhancement necessarily included a finding as to the elements of perjury, and those findings are supported by the record, we will not remand merely because the district court failed to engage in a ritualistic exercise and state the obvious for the record.

74 F.3d 470, 479 (3d Cir.1996).

Moreover, in *United States v. Gricco*, we upheld a 3C1.1 enhancement based on perjury even though the district court did not specifically identify which statements were perjurious, observing only that Gricco "testified falsely regarding material matter during trial." 277 F.3d 339, 362 (3d Cir.2002). We affirmed application of the enhancement in *Gricco*, despite the lack of specific findings by the sentencing court, because it was "obvious" from the record "that [the defendants]-both of whom denied any participation in embezzling the money from the airport and in underreporting their income-committed perjury."

The same is true here. At trial, Fernandez repeatedly explained that the reason he denied the existence of the March 22, 2007 phone calls when answering questions before the grand jury was because he did not remember the calls, see, e.g., App. at 563–567; he also asserted, during his trial testimony, that he testified truthfully before the grand jury, App. at 543, 604–05. The veracity of these statements was necessarily rejected by the jury's verdict, finding that Fernandez willfully made false statements to the grand jury. In light of the record, it was not error for the District Court to conclude that these statements constituted willful, material falsehoods warranting an enhancement under § 3C 1.1.

III.

For the foregoing reasons, we will affirm Fernandez's judgment of conviction and sentence.

All Citations

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Footnotes

- The District Court had jurisdiction under 18 U.S.C. § 3231 and we have appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).
- 2 Fernandez also claims that the jury instruction regarding unanimity impermissibly amended the indictment. After thorough consideration of this issue—which is subject to the onerous plain error standard because

Fernandez failed to raise it before the District Court—we find no error. Even assuming the instruction constituted a constructive amendment of the indictment, it was not impermissible because it did not "broaden[] the possible bases for conviction from that which appeared in the indictment." **United States v. McKee, 506 F.3d 225, 229 (3d Cir.2007) (quotation omitted). The District Court did not permit the jury to consider statements beyond those included in the indictment; accordingly, Fernandez had full notice of the charges and statements against which he needed to defend and his Fifth Amendment rights were not violated. See also **United States v. Syme, 276 F.3d 131, 148 (3d Cir.2002) ("A constructive amendment occurs where a defendant is deprived of his 'substantial right to be tried only on charges presented in an indictment returned by a grand jury.' " (citation omitted)).

We also reject Fernandez's claim that the District Court erred when it permitted the Government to question him regarding what his lawyer told him about the scope of the grand jury investigation. The Government's questions did not violate the attorney-client privilege because Fernandez repeated only what his attorney had learned from the prosecutor and the conveyance of such information does not constitute privileged legal advice. See In re Sealed Case, 737 F.2d 94, 99 (D.C.Cir.1984) ("[W]hen an attorney conveys to his client facts acquired from other persons or sources, those facts are not privileged." (quotation omitted)); see also Rhone–Poulenc Rorer Inc. v. Home Indem. Co., 32 F.3d 851, 862 (3d Cir.1994) (underlying facts do not become privileged via incorporation in an attorney-client communication). We also conclude that Fernandez suffered no harm when his attorney was precluded from testifying.

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